91-456

No._____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

JULIE ROSSY,

Petitioner

v.

ROCHE PRODUCTS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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* *Motu Proprio*

# QUESTIONS PRESENTED

1. Is testimony offered in court, *under oath* by defendant's officials deemed "evidentiary data" under a Title VII claim of sexual discrimination, or is plaintiff burdened to produce only documentary evidence to prove pretext?

2. Has the court, in the case before us, erred the purpose of protecting the rights for which Title VII was enacted by accepting defendant's "articulated reason," or should the court have gone beyond that to shift the burden to require defendant to justify the existence of any disparities and/or show a non gender-based motive for its disparate treatment of plaintiff once conflicting and obviously contrary testimony had been offered in court among defendant's officials.

# LIST OF PARTIES

The Petitioner in this matter is Mrs. Julie Rossy.

The Respondent is Roche Products, Inc. which is a wholly-owned subsidiary of Pan America Trade and Investments, Co. S.A., a corporation organized under the Laws of the Republic of Panama. Pan America Trade and Investments, Co., S.A., is wholly-owned by SAPAC Corporation, Ltd., a corporation organized under the laws of Canada. SAPAC Corporation, Ltd., is wholly-owned by Roche Holding, Ltd., a Swiss corporation. Roche Products, Inc. has no non-wholly owned subsidiaries.

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No._____

In The
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October Term, 1991

JULIE ROSSY,

Petitioner

v.

ROCHE PRODUCTS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari be issued to review judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the proceeding entitled *Nixa Ramos, et al v. Roche Products, Inc.*, Case Number 90-2107 on June 21, 1991.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, dated June 21, 1991, under the title of *Nixa Ramos, et al v. Roche Products, Inc.*, case no. 90-2107 confirming the decision of the United States District Court of Puerto Rico. Reprinted in appendix hereto, p.

App. 1, *infra*.

The opinion of the United States District Court for the District of Puerto Rico, dated October 5, 1990, consolidated cases no. 87-1637 and 87-1442 entitled *Nixa Ramos, et al v. Roche Products, Inc.*, at a bench ruling entering its findings of fact and judgment and dismissing the complaints. Reprinted in the appendix hereto, p. App. 19, *infra*.

The opinion of the United States Court of Appeals for the First Circuit, dated August 4, 1989, under the title of *Julie Rossy, et al v. Roche Products, Inc.*, case no. 88-2085 which was an appeal from the United States District Court for the District of Puerto Rico. This decision vacated the summary judgment and remanded the case for further action consistent with the opinion. Reprinted in the appendix hereto, p. App. 38, *infra*.

The opinion of the United States District Court for the District of Puerto Rico for the consolidated cases nos. 87-01442 and 87-01637 dated August 26, 1988. The opinion on Summary Judgment was entitled *Nixa Ramos v. Roche Products, Inc.*. It dismissed the complaint of Julie Rossy and ruled for a trial for Nixa Ramos. Reprinted in the appendix hereto, p. App. 49, *infra*.

The following decisions are submitted under Rule 14.1(d) of the Rules of the Supreme Court of the United States, adopted December 5, 1989, effective January 1, 1990:

1. The determination of the Equal Employment Opportunity Commission dated January 8, 1985, charge no. 021-83-3108 appearing Julie Rossy as charging party and Roche Products, Inc. as respondent. The determination concluded there was reasonable cause to believe that respondent discriminated against charging party.

2. The determination of the Equal Employment Opportunity Commission dated January 8, 1985, charge no. 021-83-3611 appearing Nixa Ramos as charging party and Roche Products, Inc. as respondent.

The determination concluded there was a question of *respondent's credibility* and there was reasonable cause to conclude that respondent had engaged in unlawful harassment and continued to do so. Both determinations have been reprinted in the appendix hereto, on pp. App. 72 and App. 79, *infra*, respectively.

The judgment of Superior Court for the Commonwealth of Puerto Rico, for the District of Arecibo, dated January 22, 1985 in civil case no. CS83-304 entitled *Julia Robles de Rossy v. Roche Products, Inc.* that had been filed January 28, 1983. The decision dismissed the case, *without prejudice*, as it was being transferred to the federal forum at the request of defendant. Certified translation of the original decision reproduced on p. App. 71, of the appendix hereto.

## JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered June 21, 1991, affirming the conclusions of the district court in dismissing charges of discrimination and retaliation filed by plaintiffs. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

■Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) to 2000(e)-17. The following sections of this statute are reproduced herein: Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e - 2(a) [p. App. 87]; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - Part IV Sec. 1-301(a), (b) [p. App. 88].

■29 L.P.R.A. §§ 146 and 148 (Law 100 of June 30, 1959, as amended) Section 146 reproduced herein at p. App. 89.

## STATEMENT OF THE CASE

The case before us originated on January 28, 1983 as a civil suit brought under 29 L.P.R.A. §§ 146 and 148 (Law 100 of June 30, 1959, as amended), [p. App. 89] in the Commonwealth of Puerto Rico by plaintiff Julia Robles de Rossy (Julie Rossy) against her employer, Roche Products, Inc. At the request of defendant, the case was dismissed in that forum, *without prejudice*, on January 22, 1985. Plaintiff filed a timely complaint (April, 1983) before the Equal Employment Opportunity Commission ("EEOC") which has consequently been ventilated before the United States Judicial System under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17. Applicable sections reprinted at pp. App. 87 and App. 88].

Julie Rossy ("Rossy") was hired by Roche Products, Inc. ("Roche") in 1976 the year in which Roche began its operations in Puerto Rico. Rossy became the first employee of the Quality Control Department after the Director of the Department who was an expatriate brought in from the sister company Hoffman-La Roche, Inc. at Nutley, New Jersey. Rossy was the sixteenth ($16^{th}$) employee hired at Roche, expatriates (Directors and Company Officials) included. Rossy became one of the two managers in the Quality Control Department; these managers reported to the director of the department. Rossy was originally hired as Quality Control Administrative Manager, but soon thereafter was *given the responsibilities* for the Quality Assurance area

for which a third manager had never been hired. Her combined position was now that of Quality Control Administration and Assurance Manager retroactive to her starting date. She was asked to go to New Jersey for training and finished the twenty-nine week training program in only nineteen weeks, receiving excellent evaluations.

Rossy studied at the University of Puerto Rico and received her Bachelor of Arts degree in Natural Sciences in 1968, Major in Biology. She holds a Masters degree in Educational Administration and Supervision from the University of Bridgeport. After beginning work at Roche, Rossy went back to school to get a law degree. Roche paid for these courses, which Rossy argues were relevant to the position denied to her on two different occasions: **Director of Quality Control and Regulatory Affairs**. This, because of the regulatory affairs aspect of the pharmaceutical industry in that the industry is regulated by the Food and Drug Administration, the Drug Enforcement Administration, the Environmental Protection Agency, as well as others.

Roche also hired Rubén Freyre ("Freyre"), the man who was first promoted to the position for which Rossy aspired later that same year. He was hired then as Laboratory Supervisor.

Mr. Freyre received a Bachelor of Science degree in Chemistry from the Universidad Central in 1975. At the time Freyre was promoted over Rossy, he had begun to take some graduate courses in Industrial Pharmacy at the University of Puerto Rico. As of October 4, 1990, the last day of the trial, *eight (8) years since he was promoted over Rossy, he had not completed the degree.* Roche argues that Freyre, although not required for advancement studied for and passed the Certified Quality Engineering exam (CQE) and received a certificate.

In March, 1981, a new position was created for Freyre, that of Quality Assurance Manager, *and part of Rossy's prior responsibilities were transferred to Freyre.*

During July, 1982 both Freyre and Rossy were recognized by Mr. James Leonard, then President and General Manager of Roche as the only two viable candidates for the upcoming position of Director of Quality Control and Regulatory Affairs that was at the time held by their immediate supervisor, Mr. Edward M[c]Mullan.

On January 4, 1983, *six (6) months after Rossy had been notified that she was a candidate for the position, and only (17) seventeen days before promoting Freyre over her,* the job description that had previously been in effect was changed.

On January 21, 1983 Rossy was notified that Freyre had been promoted over her. Mrs. Nixa Ramos ("Ramos"), a Registered Pharmacist, and Supervisor at Roche served as Rossy's witness before Roche and EEOC. Ramos later filed several retaliation charges against Roche. Both cases were consolidated. In September, 1988 Rossy filed another charge (retaliation) before EEOC for a delayed and unfair performance evaluation.

In January, 1989, Rossy was again notified that due to Freyre's resignation, Mr. Adalberto Ramírez ("Ramírez") was now being promoted into the position of Director of Quality Control. Rossy was being denied the same position for a second time for a male who had not been a candidate on the first occasion. Ramírez holds a Bachelor's degree in Biology and later completed courses to obtain a chemist's license. He holds a CQE certificate. Rossy, again, filed charges before EEOC in July, 1989.

On March 6, 1990 Rossy applied for the position of Materials Management Director. On July 31, 1990, she was notified that another male had been promoted to this

position. This was the third denial of a directorial position for Rossy. Rossy filed charges before the EEOC on September 1, 1990.

## Jurisdiction and Presentation of the Question

After Freyre was promoted, Rossy filed a charge of sex discrimination with the EEOC. The EEOC found reasonable cause to believe there was a Title VII violation and issued a *right-to-sue* letter. Rossy brought this action in the United States District Court for the District of Puerto Rico.

On August 26, 1988, the District Court dismissed Rossy's claim in response to defendant's Petition for Summary Judgment expressing her inability to show that defendant's proffered reasons for selection was a pretext for discrimination despite her fine qualifications [p. App. 53].

On August 4, 1989 in response to Rossy's appeal on the order above, the United States Court of Appeals for the First Circuit vacated the District Court's decision expressing there still existed factual disputes relevant to Rossy's final burden of persuading the court that Freyre's promotion was due to discriminatory intent [p. App. 48].

In its bench decision of October 4, 1990 the District Court accepts this as a "disparate treatment case and the Court's inquiry had to focus on plaintiff's complaint that she was treated unfairly. That means less favorable than others" [p. App. 21]. The Court expressed that "the plaintiffs' case must be examined considering the famous *M'Donnell Douglas* model" [p. App. 21]. It ruled that the "articulation of a legitimate nondiscriminatory reason for hiring Freyre over Rossy sufficed to erase the presumption raised by plaintiffs' *prima facie* case" [p. App. 23]. The court remained mute about the issues on disparate treatment that were addressed during the trial.

In the opinion rendered by the U.S. Court of

Appeals for the First Circuit dated June 21, 1991, on appeal from the decision above, the court expressed: "There is no question that Rossy established a *prima facie* case for discrimination under Title VII according to the now familiar *M'Donnell Douglas* tripartite schema" [p. App. 7]. It further held that "The employer's burden is one of production not persuasion; it must articulate a valid reason for its decision but cannot be held to the 'almost impossible burden of proving absence of discriminatory motive'." [p. App. 9] It additionally held that "The plaintiff, however, retains the burden of persuasion; it does not shift to the employer to convince the court that its stated legitimate reason for the employment was the true reason." [p. App. 9] The court remains mute about the issue of disparate treatment that was addressed in Plaintiffs' brief, pages 12 and 15, in that for the purpose of promoting male incumbents into directorial positions, these have not been required to have educational backgrounds in the areas they will direct, or on the criteria used for denying Rossy the position of Director of Quality Control on two separate occasions. The Appellate Court did not enter into the issue on the controversial statements addressed throughout Plaintiffs' brief.

## REASONS FOR GRANTING THE WRIT

In this discussion, two principal issues will be addressed: 1) the conflict among different circuit courts in dealing with pretext, an essential factor in proving discrimination under a Title VII claim, and 2) the national impact and serious consequences of the ruling in this case that may govern a future behavior inconsistent with the policies and guidelines stated by the EEOC.

Within the discussion we will address those activities that constitute sexual discrimination. The main discussion

will be focused on whether the rules set forth by *M'Donnell Douglas Corp. v. Green*, 411 U.S. 792, are being uniformly applied throughout the United States Judicial System.

The decision of the First Circuit Court in confirming the decision of the District Court of Puerto Rico is most interesting. It states that "Although we may have come to the opposite conclusion, we cannot find clear error in the district court's failure to label Roche's reasons pretextual..." [p. App. 11]. Such a statement indicates, as sustained in *Krasnov v. Dinan*, 465 F.2d 1298 that an appellate court "must accept the ultimate fact findings of the trial court unless its determination (1) is completely devoid of minimum evidentiary support displaying some hue of credibility or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors it may not alter the facts found by the trial court." If not for the deference owed the trial court, the First Circuit Court would have decided differently in our case.

In the case before us, we do not ask that the Appellate Court or this Honorable Supreme Court assume the Trial Court's place and override a judgment of its appreciation of credibility of plaintiff over defendant. The trial court never doubted the credentials or credibility of plaintiff or its witnesses. This is evidenced in the Court's own decision expressing: "I don't think that anybody seriously argues that she [Rossy] was not qualified" [p. App. 22]. "Basically, what we have before us is a genuine request by Rossy. She feels that she is qualified and that she should be given the job. I have no doubt in my mind that she feels this. And perhaps myself or somebody else would have appointed her. I just don't know. She could, perhaps, have done a very good job, too." [p. App. 26] With respect to Mr. Carrillo, a witness for Plaintiff, the

Trial Court stated "He was very sincere in saying that he perceived in his own mind that the treatment was different, but he couldn't honestly point his finger at anything in particular." [p. App. 31] The Trial Court based its ruling on the fact that Rossy failed to present "direct proof of discrimination." [p. App. 21].

The *issue in this case* is whether the conflicting and controversial testimony among the officials of Roche should be used as evidentiary data shedding lack of credibility to defendant's "articulated reasons" for not promoting Rossy and therefore proving error about the rational relationship of the evidence with the decision of the trial court.

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**Evidentiary Data as Proof of Pretext**

In *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, the court held that "It is obvious that in a case of sex discrimination, as in a case of race discrimination, we very seldom find a resolution of a board of directors or a faculty committee agreeing to engage in sex discrimination any more than we would expect to find the same in a conspiracy to violate the antitrust laws. The existence of such discrimination must therefore be found from circumstantial evidence and inferences from the circumstances." Within this case, and citing *Norris v. Alabama*, 294 U.S. 587 and others, the court held that "In discrimination cases, the law with respect to burden of proof is well settled, the plaintiff is required to make out a *prima facie* case of unlawful discrimination [at] which point the burden shifts to the defendant to justify the existence of any disparities..." . . . "Once the plaintiff has made out his *prima facie* case we look to the defendant for an explanation since he is in a position to know whether he failed to hire a person for reasons that would exonerate him."

Also under the jurisdiction of the Third Circuit

Court in *Kunda v. Muhlenberg*, 621 F.2d 532, the Court of Appeals did not accept the reason of "egregious oversight" as a reasonable explanation for failing to submit a name for promotion. This same case held that "While words such as 'articulate', 'show', and 'prove' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulating some legitimate, nondiscriminatory reason' and "proving absence of discriminatory motive." The court applauded the trial court's recognition that procedural irregularities could be considered in connection with its finding that the discrimination was intentional.

In *Schwabenbauer v. Board of Ed., etc.*, 667 F.2d 305, the Second Circuit Court questioned whether defendant had defined policy for granting credit for leaves of absences which was the issue being considered in this sexual discrimination case. The court also ruled that once a plaintiff has established a *prima facie* case of sex discrimination, the burden shifts to the defendant to make a showing in rebuttal. The defendant must show a non-gender-based motive for its treatment of plaintiff.

In *Kauffman v. Sidereal Corporation*, 695 F.2d 343, in the U.S. Court of Appeals for the Ninth Circuit, the court gave credit to both a deposition and testimony offered by officials of defendant as evidentiary data in a sex discrimination case.

In the case before us, the following testimony are examples of the "articulated reasons" for not promoting Rossy and the selection process utilized. With respect to why Mr. Leonard, President of Roche chose Freyre over

Rossy the first time (Vol. III, p. 11, lines 9 to 12):[1]

"Q. Can you tell the Court why you chose Mr. Rubén Freyre?

A. There is a number of reasons. He turned out to be the best candidate for the job in terms of overall review and probably background in Behavioral Sciences."

Neither Freyre nor Rossy had any Behavioral Science background. In response to this, in its brief to the First Circuit Court, at page 25, the defendant held this had been an "apparent slip of the tongue."

When Mr. Leonard was questioned on whether he had consulted Mr. M$^{ac}$Mullan for his feedback, since M$^{ac}$Mullan was Rossy's direct supervisor, he testified (Vol. III, p. 15, lines 7 to 18):

"Q. Who was, at the time, Ms. Rossy's direct supervisor?

A. Mr. M$^{ac}$Mullan.

Q. Did you consult Mr. M$^{ac}$Mullan about Ms. Rossy while you were doing this selection process?

A. Certainly.

Q. What did you consult with Mr. M$^{ac}$Mullan?

A. We reviewed the two candidates.

Q. Did you meet with them to review?

A. I had met with both of them, yes.

Q. No, no, did you meet with Mr. M$^{ac}$Mullan to review the two candidates?

A. Certainly."

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[1] Testimony offered in trial and referenced herein form part of three certified volumes on the proceedings submitted in evidence to the First Circuit Court and will be referenced by Volume, Page and Line No.

Later in his testimony Mr. Leonard again held in response to the difference in his testimony and that of Mr. M[c]Mullan (Vol. III, p. 17, lines 2 to 7):

"Q. So, assume that he testified in this Court that you never consulted him, that he had nothing to do with the selection, would he be departing from the truth?

A. My perspective would be that I certainly did consult with him. I cannot say from his perspective whether that would be true or untrue."

When Mr. M[c]Mullan was questioned on the difference in testimony between his and that of Mr. Leonard, above, he testified at Vol. III, p. 36, lines 12 to 20:

"Q. So as far as you are concerned, then, Mr. Leonard's testimony is incorrect.

A. No, I think it is a matter of perception and memory. He discussed all sorts of work.

Q. But he did not discuss with you the selection of the candidates.

A. No.

Q. So his testimony is incorrect, in that respect.

A. His memory is faulty in that respect, perhaps."

With respect to the second time Rossy was denied a directorial position Mr. M[c]Mullan, at this time Vice President of Roche, testified in Vol. I, p. 22, lines 10 to 25:

"Q. Did you discuss the objective qualification of other candidates?

A. Yes.

Q. Which candidates?

A. All of the managers who were reporting to Mr. Freyre. That would have been Victor Berberena, Julie Rossy, Matti Muñoz and Adalberto Ramírez.

Q. And did you fully discuss the qualifications of all of

them.

A. My recollection is we did.

Q. How extensively?

A. It was a long meeting. I have no idea.

Q. How long would you say that meeting lasted?

A. An hour or two.

Q. And who was present besides you and Mr. Brown?

A. My recollection is that Héctor Alvarez was there."

When Mr. Héctor Alvarez, Director of Human Resources was questioned on the same subject he testified at Vol. I, p. 30, lines 23 to p. 31, line 3:

"Q. And which candidates were, at the time, considered to be, to substitute Mr. Freyre?

A. It was three candidates Adalberto Ramírez, Matti Muñoz and Victor Berberena.

Q. Was Mrs. Julie Rossy considered?

A. No, sir."

When Mr. Brown, President of Roche and responsible for making the decision, was questioned on this same subject in his deposition submitted as evidence in Plaintiffs Exhibit 136, p. 15, lines 7 to 24, he testified:

"Q. Okay, and what other criteria, other than the recommendation of Rubén Freyre, did you have or did you utilize to appoint Adalberto Ramírez to the position of director of quality control?

A. No other criteria.

Q. So you took Mr. Freyre's recommendation at face value to determine that the best candidate was Adalberto Ramírez?

A. Yes, sir.

Q. Did you consider any other candidates?

A. No, sir.

Q. Didn't you consider Miss Matti Muñoz?
A. Her name was mentioned, I didn't consider her.
Q. Did you consider Mrs.Julie Rossy?
A. No, sir.
Q. Why not?
A. Her name was never mentioned."

This is contradictory to *Schwabenbauer v. Board of Ed., etc.*, [667 F.2d 305] where the court questioned the lack of a defined policy for defendant's actions. In this case there is no criteria for promoting other than the recommendation of other directors.

The testimony given by Messrs. M$^{c}$Mullan, Brown and Alvarez are completely contradictory with respect to candidates. Mr. M$^{c}$Mullan says Rossy was considered, Mr.Alvarez says although others were considered Rossy was not, and Mr. Brown says no one other than Ramírez was considered.

The ruling in our case is also contradictory to *Kunda v. Muhlenberg* [621 F.2d 532]. In that case, sexual discrimination was determined on the *failure of Defendant to forward Kunda's name with other names to be considered for promotion.*

With respect to a ranking of managers *supposedly* performed by directors of managers, in which Rossy was found to be less popular than Freyre, Mr. Brown, in Exhibit 136, at p. 36, line 21 to p. 37, line 6, expressed:

"Q. Who did the ranking, the directors?
A. The managers.
Q. The managers did the ranking?
A. Right.
Q. Of themselves.
A. That's correct.
Q. Of each other?
A. Yes.

Q. The directors had nothing to do with that?
A. No."

Further, on that same p. 37, lines 18 to 23:

"Q. Do you know if a ranking was made when Adalberto Ramírez was appointed?
A. No.
Q. You don't know or it was not made of them?
A. It was not."

When Mr. Héctor Alvarez, Director of Human Resources, was questioned on the subject of ranking, he testified at Vol. I, p. 34, lines 1 to 11:

"Q. Now, going back to those rankings. Who participates in those rankings?
A. Other directors.
Q. Are rankings made of managers by managers?
A. No.
Q. Were you present at the deposition of Mr. Edward Brown?
A. Yes, I was present.
Q. Did Mr. Edward Brown say that the only, in his deposition, that the only ranking ever conducted at Roche was made by managers for managers?
A. He was confused."

On the same subject, in testimony offered by Mr. Alvarez at Vol I, p. 68, lines 1 to 6, he states:

"Q. (By Mr. Santiago) You stated that the second ranking that was performed, was performed at the request of Mr. Brown.
A. Yes, that is correct.
Q. And that you say when Ed Brown says that no such ranking was made, he is incorrect.
A. He is confused."

On lines 9 to 11 of the same page:

"Q. And when he says that the ranking was made of managers over managers, you also said that it is incorrect.

A. That is correct."

It is crucial for the Court to observe that in the testimony above, during trial and under oath, Mr. Alvarez states that the second ranking was made at the request of Mr. Brown and that the ranking had been performed of managers by directors. In complete contradiction to Mr. Alvarez' testimony, Mr. Brown admitted that the only ranking ever performed had been of managers by managers and not by directors and that the second ranking had never been performed. Similar *alleged* rankings have never been used for promoting other male incumbents into directorial positions. M[cc]Mullan states (Vol. I, p. 21, lines 20 to p. 22, line 1):

"Q. Well, but during that period of six or seven years, at least more than two directors were promoted to the position or became directors: is that correct?

A. About two, I believe, yes.

Q. Did the company conduct any rankings on those two occasions?

A. No."

The only "articulated reasons" given for the contradictions by the defendant are "confusion" on the part of its officials. The contradictions above cast serious doubts on whether the articulated reasons were a belated conspiracy to justify an otherwise illegal sex discrimination.

On defendants allegations that Freyre had received better evaluations than Rossy, Mr. Alvarez, Director of Human Resources, states (Vol. I, p. 55, lines 9 to 25):

"Q. (by Mr. Santiago) Okay. Let's go to that one.

Isn't it true that the supervisor who evaluated him, graded him that year as excellent?

A. Mr. M[sic]Mullan.

Q. Yes.

A. Yes.

Q. And you crossed out and put on 'exceptional.'

A. It is crossed out and it was written 'exceptional.' I don't know if I did the changes or the Compensation Manager at that time.

Q. Do you remember what you said in your deposition?

A. The same thing.

Q. Don't you recall that you said in your deposition that you were the one who made the change?

A. On that I was mistaken.

Q. You were mistaken then or now.

A. In the deposition."

The obvious question is at what point were the evaluations changed... for what purpose... and by whom? Was this also a belated conspiracy to provide another "articulated reason" for having promoted an otherwise less qualified male? Although the Appellate Court mentions that: "Rossy alleged that Freyre's evaluations were belatedly upgraded..." [p. App. 11], it remains mute on its evaluation of Exhibits 130 and 131 submitted by plaintiff as proof of tampering with documents or on the admissions addressed in the testimony above.

In response to these and other contradictory statements made by defendant's officials, Defendant held in its brief to the U.S. Court of Appeals for the First Circuit (at p. 25) that these were: "nothing more than differing perspectives among the individual witnesses on irrelevant matters or insignificant nitpicking." Plaintiff disagrees. These were definitely significant matters. The contradictions addressed weigh heavily with respect to the process

and criteria used to deny promotions to Rossy. In *Kunda v. Muhlenberg*, 621 F.2d 532, the court refused to accept an "egregious oversight" as a legitimate "articulated reason;" *in the present case*, "confusion", "surprise," "different perspectives," "mistakes," and "slips of the tongue," on behalf of the defendant's officials are expected to be accepted as such. Webster defines "contradiction" as "propositions so related to another that if either of the two is true, the other is false." Relying on this definition, we must reasonably conclude that the defendant has, under oath, upheld untruths and, therefore, pretext will have been proven by defendant's own testimony.

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Disparate Treatment

Claims of employment discrimination under Title VII may arise in two different ways. An individual may allege being subjected to "disparate treatment" because of sex, or being the victim of a facially neutral practice having a "disparate impact" on their gender. *Furnco Construction Corp. v. Waters*, 438 U.S. 567. In *M'Donnell Douglas Corporation v. Green*, 411 U.S. 792, the Court set forth the applicable rules of burden of proof in a "disparate treatment" case. The claim there was racial discrimination, but the language is equally applicable to the claim of any group protected by Title VII, *Kunda v. Muhlenberg*, 621 F.2d 532.

In the case before us both the Trial Court [p. App. 21] and the Appellate Court [p. App. 4] agree in that this is a disparate treatment case, yet neither of the two entered into discussion of the evidence on this subject. The Trial court sustains plaintiff did not supply hard evidence to prove this issue and the Appellate Court remains mute on its findings.

In *Kunda v. Muhlenberg*, 621 F.2d 532, Third

Circuit, plaintiff was found to have proven sex discrimination because no one had told her that "a masters degree would be mandatory in order for her to be promoted or considered for tenure in the future." Plaintiff was also credited with having satisfied the requirements for promotion since she had the scholarly equivalent of the master's degree and recognized achievement in her field. The court held that: "lack of a master's degree was pretextual in view of its promotion of male members of the department who did not have master's degrees." The court determined sexual discrimination because defendant gave no convincing reason for the failure of its officials to inform Kunda of the necessity of obtaining a master's degree. The court further states: "In view of the importance which the College itself placed on the possession of such a degree, notwithstanding the published standards referring to other criteria, the disparate treatment could reasonably have been considered substantial by the trial court." . . ."Intentional unfair employment practices are those engaged in deliberately and not accidentally. No willfulness on the part of the employer need be shown to establish a violation."

In *Schwabenbauer v. Board of Ed., etc.*, 667 F.2d 305 (2nd Circuit), citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, the court held: "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."

In *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, in the U.S. District Court for W.D. Pennsylvania, plaintiff was awarded relief under a sexual discrimination case because "at no time was plaintiff advised that the criteria for promotion in her department had changed." Here, the court held that defendant had "applied different standards than those which were applied to plaintiff." The

court held against defendant that it "introduced evidence, most of it gathered after the making of the decision to discharge her, to indicate that she was a poor teacher."

In a file note, written by Mr. M[sc]Mullan at the time of Rossy's first denial of the position of Director of Quality Control and Regulatory Affairs and addressed in trial at Vol. I, p. 198, line 15 and 22 it stated:

"Q. (By Mr. Santiago) What does Mr. M[sc]Mullan say about the decision in Exhibit 81?

A. He says and I quote, 'Mr. Brown explained that this had been a very difficult choice between two excellent candidates and assured her that she had an excellent future with the company.'

Q. Who writes that memo?

A. Mr. Edward M[sc]Mullan, on February 22, 1983."

Rossy, with her qualifications had been deemed an "excellent candidate" for the position she was being considered since July 22, 1982, (for six months) and which she had been denied exactly one month before the date of this file note.

The qualifications of Rossy, Freyre and Ramírez have been detailed in the statement of the case. Rossy holds an MS and a JD; degrees which the males promoted over her do not possess. Rossy has a degree in Biology whereas the other two male incumbents have degrees in Chemistry. Defendant claims the males were better qualified than Rossy due to a CQE license which Rossy does not possess. Notwithstanding this fact Rossy had been deemed an "excellent candidate."

Although Defendant has stated that the CQE license was an important factor in promoting Freyre, its own expert, Mr. Dalise at Vol. II, p. 167, lines 3 to 7 expressed that 42 hours would be enough time to prepare for and pass the examination.

With respect to the qualifications of the position, these were changed without notifying Rossy only 17 days prior to denying her the promotion, although she was a candidate for this same position since July of 1982 (defendant's testimony at Vol. I, p. 14, line 13 to p. 15 line 4):

"Q. (by Mr.Santiago) Isn't it true that on January 4, 1983, it was the description of the position of Director of Quality Control and Regulatory Affairs which you held at that time, was changed in the following manner:

The name of the position from the title, it was deleted or taken away, any mention of Regulatory Affairs. And it was named just, or described the position as Director of Quality Control and nothing else?

A. I believe so, I haven't seen it recently, but if you say so I won't argue with it.

Q. Isn't it true that instead of a required Doctoral Degree, it was changed to post-graduate studies in science preferred or Master's degree desirable in a relevant discipline or the equivalent in appropriate education and experience, ASQC certification as quality engineer, desirable but not obligatory?

A. Yes."

Regulatory Affairs responsibilities were removed to articulate that now Rossy's law degree would be of no value to the position and a CQE license, which she did not possess, was deemed "desirable." The addition of "post-graduate studies in science" favored Freyre although the second male promoted over Rossy into this position had no post-graduate studies at the time [Vol. III, p. 94, lines 20 to 24].

With respect to the change of requirements of the job description, the following testimony was given by Mr.

Alvarez (Vol. I, p. 63, lines 6 to 19):

"Q. And besides the format, what else did you discuss with M[ac]Mullan about the changes in the job description?

A. That the previous job description was an ugly copy and that the requirements needed there, I agreed with him that it was not necessary.
And that was it.

Q. And did you lower it, the requirements, then?

A. He lowered it.

Q. He lowered the requirements and what did they do with the Regulatory Affairs stage of it, which that position carried before the job description was changed in December 1983?

A. Well I didn't do any changes, but that responsibility was kept with him when he was moved from the Quality Control area."

Mr. Alvarez admitted the requirements for the position were lowered to fit a less qualified male. This is one of the reasons why the EEOC determined in favor of Rossy, since it is an illegal practice within the agency's standards. See [p. App. 74].

Mr. M[ac]Mullan kept the responsibilities of Regulatory Affairs upon departing the Quality Control area. Mr. Alvarez sheds light on the disposition of those responsibilities at present (Vol. I, p. 67, lines 12 to 16):

"Q. Isn't it true, then, that when Freyre left the position of quality, Director of Quality Control, the Regulatory Affairs portion came back and now Mr. Adalberto Rodríguez, [wrong surname], who holds that position, takes care of that portion?

A. That is correct."

The Court will recall that Rossy's law degree was

deemed irrelevant as the regulatory affairs responsibilities were removed from the position requirements upon the first denial. When questioned on his participation in the selection process the first time Rossy was denied the position, Mr. M[sc]Mullan stated (Vol. I, p. 10, lines 18-20):

"Q. Were you consulted about whether Julie Rossy should be picked over Mr. Freyre, or otherwise?
A. No. "

With respect to the second time Rossy was denied the same position, Mr. Brown, President of Roche, stated (Exhibit 136, p. 15, line 7 to 11):

"Q. Okay, and what other criteria, other than the recommendation of Rubén Freyre, did you have or did you utilize to appoint Adalberto Ramírez to the position of director of quality control?
A. No other criteria."

The Court will observe that on the first denial, Mr. M[sc]Mullan, Rossy's immediate supervisor, was not consulted. On the second denial, the sole recommendation of the male's (Ramírez) immediate supervisor sufficed to award him the promotion.

On the issue of the *alleged* ranking of managers and who performs them (Vol. I, p. 34, line 25 to p. 35 line 6) Mr. Alvarez stated:

"Q. And in making that evaluation, isn't it true that some directors might have to evaluate managers with whom they never have any dealings with?
A. Can you - -
Q. In the Company, everyday supervision
A. Well, some directors don't supervise the managers, that is correct."

He goes on to explain the purpose of the rankings

(Vol. I, p. 29, lines 20 to 24):

"A. I was requested by my immediate supervisor, Mr. Edward Brown, to conduct a ranking of managers by the directors.

Q. For what purpose?

A. He needed for to make a decision on the replacement of Mr. Rubén Freyre."

Defendant has articulated that one of the criteria for not promoting Rossy the first time upon the replacement of Mr. M[ac]Mullan was that she had ranked lower than Freyre in the ranking conducted in 1981.

In addition to the fact that these supposed rankings may in themselves be illegal as they are conducted by all male directors with whom Rossy has no reporting relationship, the ranking has not been used to promote other males into directorial positions. M[ac]Mullan states (Vol. I, p. 21, lines 20 to p. 22, line 1):

"Q. Well, but during that period of six or seven years, at least more than two directors were promoted to the position or became directors; is that correct?

A. About two, I believe, yes.

Q. Did the company conduct any rankings on those two occasions?

A. No. "

In Exhibit 136 after already admitting that his bachelor's degree was in accounting, Mr. Brown expressed on p. 11, lines 9 through p. 12, line 3:

"Q. As director of pharmaceutical operations for Roche, what responsibilities did you have?

A. Pharmaceutical operations.

Q. Yes?

A. Responsibility for the production of pharmaceutical products.

Q. How many people did you have under your supervision?

A. My estimate would be over a hundred over the period of years. You know, from starting, over a period of years, I would say, oh, anywhere from a hundred to a hundred and fifty. I am not quite sure.

Q. Did you supervise professionals?

A. Yes.

Q. What kind of professionals?

A. Pharmacists, chemists, pharmacists, basically pharmacists. Engineers, industrial engineers."

The same pattern is observed in Mr. Alvarez' testimony, Vol. I, p. 49, lines 16 through p. 50, line 10:

"Q. Now also, the other criteria ... Well, before we go to that. In Roche, are there directors who are head of some departments whose degrees are not the same as what the people he supervises have?

A. Yes.

Q. For example, what is your degree?

Q. I have a Master's in Business Administration and Finance.

A. Do you supervise a medical doctor?

A. That is correct.

Q. Now, who is in charge of the engineering department, who is the director of the engineering department?

A. Manuel Abruña.

Q. And Manuel Abruña, what is his degree in?

Q. He had a Bachelor's in Administration.

A. And he is the Director of Engineering Department; is that correct?

A. That is correct. And he has got some engineering courses taken by, I don't recall, by correspondence or something like that. "

For the purpose of promoting male incumbents, the degree held has no relevance on the position occupied and "correspondence or something like that" can qualify a male to hold directorial positions at Roche. In Rossy's case, her Biology degree was deemed less than Freyre's Chemistry degree. Her M.S. and J.D. degrees were found irrelevant and she was required to hold a CQE license, which was never required of her before, and which was incorporated into the position 17 days before denying her promotion.

In *Kunda v. Muhlenberg*, 621 F.2d 532, the court determined that in a disparate treatment case "plaintiff must be evaluated in light of its practices toward the allegedly more favored group, in this case males." It also held that "such disparate treatment constituted purposeful discrimination on the basis of sex. In *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, the Court held that there was intentional wrongdoing from the failure to implement or set any date for an affirmative action plan or taken substantial steps to eliminate discrimination while affirmative action was to have been taken more so while complaints of sex discrimination were pending. In the case before us Roche has not only failed to promote females into directorial positions for the past fifteen (15) years, but has denied Rossy directorial positions on two additional occasions since she filed her original complaint. [See also pp. App. 77 and App. 83.]

## National Impact

By confirming the decision of the Trial Court and First Circuit Court in this case, this Honorable Supreme Court would be changing the guidelines set forth by the EEOC which is the expert agency assigned by Congress, the primary task of marking out the scope and defining standards through interpretation of legislative intent, and to

implement complex legislative schemes [p. App. 88].

This Court would be saying "YES" to lowering job requirements in favor of less qualified incumbents; "YES" to accepting candidates for promotion not on their qualifications, but on illegal recommendations of others, which constitute a protected group. It would be saying "YES" to conspiracy and to disparate treatment of females in favor of less qualified males. It would be saying "YES" to the following selection criteria as contained in Mr. Brown's (President of Roche) deposition (Exhibit 136, p. 16, lines 7 to 18):

"Q. So the only method that you utilize to promote candidates, lets say, to the position of directors is by the recommendation of other people in the company?

A. Yes.

Q. Do you personally review the personnel files of each candidate that is recommended to you?

A. No.

Q. Do you do anything else other than listen to the recommendations to pick the candidate, you personally, that you may do?

A. No, sir."

A similar criteria (none) is admitted by Mr. Alvarez, the officer responsible for assuring compliance of Title VII at Roche (Vol. I, p. 69, lines 1 through 20):

"Q. Now, did you use in selecting Adalberto Ramírez, this time, to replace Freyre, the same criteria that was used when Freyre was picked over Julie Rossy?

A. I didn't use any criteria, because I didn't make the decision. The decision was made by Mr. Edward Brown. I just participated in the ranking. Same as the other directors.

Q. So, it is Mr. Brown who knows the criteria that he

used.

A. That is correct.

Q. That was used.

A. That is correct.

Q. And Mr. Brown says that the only criteria he utilized was the fact that Freyre before he left, he said appointed Adalberto Ramírez?

A. That is what he said.

Q. You don't have any evidence to show that it was otherwise done.

A. No.

Q. And you were not consulted beforehand to evaluate candidates.

A. No."

And last, but not least, it would be saying "YES" to incorporating the practice of "brown nosing" or "schmoozing" as a promotion criteria accepted in the "every day business world" (Vol. I, p. 132, line 1 through p. 133, line 3). Whether the Trial and Appellate Courts reached "wrong" conclusions, that is to mean, inconsistent with Supreme Court, other Appellate Courts, the EEOC, whether Rossy was burdened in producing "direct evidence" and considering the impact of this decision in the business world deserves the attention and guidance of this Honorable Supreme Court.

## CONCLUSION

The Honorable Supreme Court should either remand this case to the lower courts for a new trial or vacate the decisions of the Trial Court and the First Circuit Court and ORDER that (a) Roche modify its award of a directorial selection procedure and requirements uniformly, (b) Roche reconsider the qualifications of the females on its payroll for

directorial positions within the company, (c) Roche grant Rossy the next available directorial position for which she may qualify according to the qualification and requirements made of previous male incumbents and (d) Roche award Rossy back-pay from January, 1983 at which time she was denied the first directorial position for which she was qualified.

For the reasons specified herein it is respectfully requested that this Petition for Certiorari be granted.

*RESPECTFULLY SUBMITTED*,

JULIE ROSSY
*September 13, 1991*

# United States Court of Appeals
# For the First Circuit

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No. 90-2107

NIXA RAMOS, ET AL.

Plaintiffs, Appellants,

v.

ROCHE PRODUCTS, INC.,

Defendant, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jose Antonio Fuste, U.S. District Judge]

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Before

Campell, Circuit Judge,
Bownes, Senior Circuit Judge,
and Torruella, Circuit Judge.

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A. Santiago-Villalonga with whom Nachman & Fernandez-Sein were on brief for appellants.

David A. Copus with whom Donald B. Ayer, James E. Anklam, Jones, Day Reavis & Pogue, Luis F. Antonetti and Goldman, Antonetti, Ferraiouli & Axtmayer were on brief for appellee.

June 21, 1991

BOWNES, Senior Circuit Judge. This is an appeal from a consolidated action in which plaintiffs-appellants Julie Rossy and Nixa Ramos have respectively alleged sexual discrimination and retaliation in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 20003e-17. [1]

In August of 1988 the district court, after dismissing

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[1] Section 20003-2 reads in pertinent part:

**§ 20003-2. Unlawful employment practices**

**Employer practices**

(a) It shall be an unlawful employment practice for an employer--

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

. . . .

Section 2000e-3 reads in pertinent part:

**§ 2000e-3 Other unlawful employment practices**

**Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**

(a) It shall be an unlawful employment practice for an employer to discriminate against any of this employees . . . because he [that employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

. . .

plaintiffs' claims of racial animus brought under 42 U.S.C. § 1981 and striking their request for a jury trial, dismissed their state law claims as time-barred and Ramos' sex discrimination claim for failure to exhaust administrative remedies. The court also granted defendant Roche Products' ("Roche's") summary judgment motion as to Rossy's sex discrimination claim but denied Roche's motion regarding Ramos' retaliation claim. *Ramos v. Roche Products, Inc.*, 694 F. Supp. 1018 (D.P.R. 1988) (*Ramos* I), vacated sub mon. *Rossy v. Roche Products, Inc.*, 880 F.2d 621 (1st Cir. 1989). On appeal by Rossy, we vacated the grant of summary judgment on her sex discrimination claim and remanded her case for trial. *Rossy, supra*.[2] From October 1-4, 1990, the district court held a bench trial on Rossy's claim of sex discrimination and Ramos' claim of retaliation. The court then entered judgment against both Rossy and Ramos. *Ramos v. Roche Products, Inc.*, No. 87-1442 (D.P.R. October 5, 1990) (*Ramos* II). This appeal ensued. We now affirm the conclusions of the district court.

## I. BACKGROUND

Although Rossy and Ramos have made different charges under Title VII, many of the facts are equally applicable to both of their cases. Both women were hired by Roche in 1976, the year Roche began its Puerto Rican

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[2] On her initial appeal from summary judgment, Rossy did not challenge the order striking the jury request or the dismissal of her state law claim. Also, she failed to question the 1988 dismissal of diversity allegations or the dismissal of her spouse and their conjugal partnership as plaintiffs.

operations. Roche manufactures prescription drugs including Valium and Dalmane. Rubén Freyre, who was later promoted to the position to which Rossy aspired, was also hired in that year. Rossy became one of four managers in the quality control department; these managers report to the director of the department, the position for which Rossy and Freyre were later to compete. [3] Ramos consecutively held four supervisor-level positions in the quality assurance section. Supervisors report to managers; often Ramos worked with and under Rossy.

In 1981 Roche reorganized the quality control department and named Freyre to the newly created position of quality assurance manager, shifting this responsibility from Rossy and, in turn, appointing her manager of administrative services. In January 1983 Roche promoted Freyre to director of quality control. Roche claimed that Freyre's college degree in chemistry, his work on the Valium and Dalmane projects, his attaining a Certificate of Quality Engineer ("CQE"), his incipient graduate work in industrial pharmacy and his "exceptional" job evaluations effectively trumped Rossy's college degree in biology, her advanced degrees in educational administration and law, her

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[3] Roche has ten directors in its Puerto Rican plant. It has never hired a female director nor has it promoted a female to that position. We stated in *Rossy*, 880 F.2d at 623:

> Roche has reported since 1971 that there exists an underutilization of women in the Officials and Managers 1 category, which includes all director positions. Rossy claims that at the time of Freyre's promotion the underutilization occurred with an 18.3% availability of women in the labor pool. Up to this point, there have never been any female directors at Roche.

varied work experience and her consistently "excellent" job evaluations. When Freyre left Roche in 1988, another man, Adalberto Ramírez, was chosen director of quality control.

Further, Roche bypassed Ramos to give Freyre's vacant position as manager of quality assurance to Victor Berberena and Freyre's former position as manager of quality control laboratories to Matti Muñoz, both males, in March of 1983.

Immediately after Freyre was promoted over Rossy in January 1983, Rossy filed a sex discrimination suit against Roche in superior court in Puerto Rico and named Ramos as one of three witnesses to the alleged discrimination against her. Although Ramos did not submit a signed affidavit to the Equal Employment Opportunities Commission ("EEOC") until September 30, 1983, she claimed that her support of Rossy caused Roche to retaliate, denying her the aforementioned managerial positions in March and reducing her job evaluation from "excellent" to "very good" in June of 1983. While Roche did not lower Ramos' salary, it allegedly assigned her to successively inferior positions, some unrelated to her training as a pharmacist. [4] Finally, after several probationary terms with unsatisfactory evaluations, Ramos was fired on July 17, 1989.

Rossy and Ramos brought separate suits against

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[4] Ramos did, however, testify at trial that Rossy was among those managers who voted in April of 1984 to abolish Ramos' job as group supervisor and that Roche created another position for her instead of letting her go.

Roche in 1987. [5] Initially they rested their claims on Title VII of the 1964 Civil Rights Act, as well as 42 U.S.C. § 1981 and Puerto Rico Law 100, 29 L.P.R.A. § 146. As previously noted, the cases were consolidated and the latter two claims ultimately dismissed.

## II. Clear Error Standard

In a Title VII case we review the district court's findings of fact under a "clearly erroneous" standard. Fed. R. Civ. P. 52(a) provides in a pertinent part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Supreme Court has held that "a finding of intentional discrimination is a finding of fact." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). "Treating issues of intent as factual matters for the trier of fact is commonplace." Hence, "discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact . . . ." *Pullman Standard,*

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[5] Although Ramos was not fired until 1989 after she had received three job ratings of "does not meet standards," she filed suit in 1987 alleging retaliatory acts by Roche resulting in her lowered evaluations, failure to be promoted to manager and transfer to lesser positions.

*Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 288-89 (1982). See also *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 781 (1st Cir. 1990); *Athas v. United States*, 904 F.2d 79, 80 (1st Cir. 1990); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 152 (1st Cir. 1990) (acknowledging the superior "bird's-eye view" of the district court in Title VII fact-finding); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 392 (1st Cir.) (disavowing "Monday-morning quarterbacking" of factual issues by appellate court), *cert. denied* 111 S. Ct. 233 (1990).

This high standard does not permit a finding of clear error unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). And if there are "two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574. See also *Jackson v. Harvard University*, 900 F.2d 464, 466 (1st Cir.) (quoting *Anderson*, supra), *cert. denied*, 111 S. Ct. 137 (1990).

## III. Review of Facts

### A. Rossy's Sex Discrimination Charge

There is no question that Rossy established a *prima facie* case for discrimination under Title VII according to the now-familiar *M'Donnell Douglas* tripartite schema. Allegations of discriminatory promotion and firing, as well as retaliatory actions, have all been found compatible with the *M'Donnell Douglas* rubric. *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 107 (1st Cir. 1988). See also *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st. Cir. 1987) (Title VII covers denial of raises, unlawful discharge and

retaliation for filing charges with EEOC.). See generally *M'Donnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). As the Supreme Court has instructed, this allocation of evidentiary burdens was "never intended to be rigid" but is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), *quoted in White v. Vathally*, 732 F.2d 1037, 1040 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984).

Rossy demonstrated by a preponderance of the evidence that she was in a protected class, that she applied for an advertised job, that she was rejected, and that someone with her essential qualifications was hired. *Accord Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 70 (1st Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979).

In the second prong of *M'Donnell Douglas*, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (quoting *M'Donnell Douglas*, 411 U.S. at 802). We have further held that when a plaintiff has proved by direct evidence, not inference, that "unlawful discrimination was a motivating factor in an employment decision," there is a greater burden on the employer. The latter must then "prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." *Fields v. Clark University*, 817 F.2d 931, 937 (1st Cir. 1987). Otherwise, the employer must merely articulate a plausible,

nondiscriminatory reason for rejecting the plaintiff. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (*per curiam*) (plurality opinion). The employer's burden is one of production, not persuasion; it must articulate a valid reason for its decision but cannot be held to the "almost impossible burden of proving 'absence of discriminatory motive.'" *Menard v. First Sec. Services Corp.*, 848 F.2d 281, 287 (1st Cir. 1988) (quoting *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987) (citations omitted)); *Oliver v. Digital Equipment Corp.*, 846 F.2d at 108-09 ("[D]efendant must offer more than vague, general averments of good faith" so that plaintiff can understand and try to rebut employer's reasons.). The plaintiff, however, retains the burden of persuasion; it "does not shift to the employer to convince the court that its stated legitimate reason for the employment decision was the true reason." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 (1989)(citations omitted). See also *Burdine*, 450 U.S. at 256-58.

Roche insisted here that Freyre was not only better qualified and had higher job evaluations than Rossy, but that his qualifications -- his honors degree in chemistry and his CQE -- were more relevant to the position than were Rossy's degrees in law and educational administration. We have long held that "[o]ur role is not to second-guess the business decisions of an employer, imposing our subjective judgments of which person would best fulfill the responsibilities of a certain job." *Rossy*, 880 F.2d at 625. See also *Petitti v. New England Tel. and Tel. Co.*, 909 F.2d 28, 31 (1st Cir. 1990); *Keyes v. Secretary of Navy*, 853 F.2d 1016, 1024-26 (1st Cir. 1988). The question is not

whether the employer's action was wise, but "the relevant question is simply whether the given reason was a pretext for illegal discrimination." *Loeb*, 600 F.2d at 1012 n.6 (footnote omitted).

This reason can, however, be rebutted in the third prong of *M'Donnell Douglas*. Should the defendant carry this burden, the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a . . . discriminatory decision." *M'Donnell Douglas*, 411 U.S. at 805. At this juncture, the employer's reason is subject to scrutiny. "The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." *Loeb*, 600 F.2d at 1012 n.6.

Pretext can be exposed in several different ways. In another recent promotion case, *Patterson v. M'Lean Credit Union*, 491 U.S. 164 (1989), the Court held that the petitioner

> might seek to demonstrate that respondent's claim to have promoted a better-qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. . . . There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual. Thus, for example, petitioner could . . . [submit] evidence of respondent's past treatment of petitioner . . . .

*Id.* at 187-88. See also *Brown v. Trustees of Boston University*, 891 F.2d 337, 347 (1st Cir. 1;989) (Sex

discrimination plaintiff could show employer's motive unworthy of belief or offer proof of another motive.). See generally *Connell v. Bank of Boston*, 924 F.2d 169, 1182 (1st Cir. 1991) (Bownes, J., dissenting and concurring) (interpreting *Burdine* to mean that plaintiff's *prima facie* case plus proof of pretext in employer's articulated reason for discrimination sufficient to avoid summary judgment).

Rossy attempted to demonstrate her superlative qualifications; however, she could offer no direct evidence of past discriminatory treatment by Roche. Rossy alleged that Freyre's evaluations were belatedly upgraded and Roche's job description was altered to conform to Freyre's specific qualifications. *Rossy*, 880 F.2d at 625. The district court, however, did not find Rossy's circumstantial evidence adequate to refute Roche's *bona fide* reasons for hiring Freyre. "Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent. . . ." *Dea v. Look*, 810 F.2d at 15. The plaintiff's burden of proving pretext may not be met "simply by refuting defendant[']s articulated reason." *White*, 732 F.2d at 1042. Although we may have come to the opposite conclusion, we cannot find clear error in the district court's failure to label Roche's reasons pretextual.

B. Ramos' Retaliation Charge

Ramos' claim that her diminished evaluations, job placements incompatible with her qualifications and training, probationary status and ultimately her firing, resulted from retaliation also fits under the rubric of Title VII. To demonstrate a *prima facie* claim of retaliation, the plaintiff

> must show by a preponderance of the reliable evidence that (1) she engaged in a protected activity as an employee, (2) she was subsequently discharged from employment, and (3) there was a causal connection between the protected activity and the discharge.

*Hochstadt v. Worcester Foundation*, 425 F. Supp 318, 324 (D. Mass), *aff'd*, 545 F.2d 222 (1st Cir. 1976), cited in *Petitti*, 909 F.2d at 33. See also *Morgan v. Massachusetts General Hosp.*, 901 F.2d 186, 193 (1st Cir. 1990) (delineating *prima facie* case for retaliatory discharge).

Following the precepts of *McDonnell Douglas*, Ramos was able to make her *prima facie* case, even on the first round in the district court. *Ramos* I, 694 F. Supp. at 1023-25. She was a member of a protected class, engaged in protected activity, *i.e.*, serving as a witness in Rossy's sex discrimination suit. Her employer was aware of her protected activities; in fact, Roche reassured Ramos in February of 1983 that she would not suffer retaliation. She also endured alleged harassment on the job within a period closely following her protected activities and was subsequently discharged. Hence, a retaliatory motive could at least be reasonably inferred. See *Petitti, supra*, at 33-34.

Ramos' problem lies in the third prong of her retaliation claim -- establishing the causal nexus between her protected activity and the alleged retaliation leading to discharge by Roche. The chronology itself is not entirely dispositive. Ramos' name was proffered as a witness for Rossy in February 1983, but she did not create and sign an affidavit for the EEOC attesting to any discriminatory

employment practices at Roche until September 30, 1983, long after she was twice bypassed for promotion in March of that year. Roche maintained that Ramos was not qualified for these positions and had failed her CQE examination three times. Moreover, two other witnesses to Rossy's charges of discrimination could pinpoint no overt retaliation. One of them, Juan Carrillo, admitted that "he perceived in his own mind that [his] treatment was different" after he testified for Rossy, "but he couldn't honestly point his finger at anything in particular." He remained with the company for nine more years, leaving of his own volition.

Ramos also claimed that Roche's retaliatory acts affected her job evaluations and placements beginning in 1983. While her job as group supervisor had been eliminated by a consensus of managers including Rossy, Ramos retained her same salary despite repeated job changes, viewed by her as demotions. Especially after she was placed on probation, which was extended by Roche in lieu of termination, Ramos understandably felt harassed and humiliated by the treatment she received. [6] Still, her accusations remain largely conclusory and lacking in the concrete documentation necessary to prove the causal link between her protected activity and her retaliatory treatment. See *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2d Cir.) (stressing need for causal link by reversing summary judgment to establish proof of causal connection for *prima facie* case of retaliation), *cert. denied*,

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[6] She testified, *inter alia*, that she was assigned a desk in a small, hot room adjacent to the boilers in the plant. This testimony went uncontradicted.

484 U.S. 965 (1987); *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982) (denying retaliation claim because of break in "the requisite causal link between the decision to implement the [company] policies and [plaintiff's] EEOC complaint").

Despite her anguish and distress, Ramos has not met her burden as plaintiff. Moreover, Roche has documented nonpretextual reasons for terminating Ramos' employment based on her inability or disinclination and ultimate failure to fulfill job assignments.

## IV. Jury Trial Issue and Title VII

While the seventh amendment grants a trial by jury to any party seeking to enforce "common law" rights, the equitable rights sought under Title VII are generally not deemed to require trial by jury. For example, in *Olin v. Prudential Ins. Co. of America*, 798 F.2d 1 (1st Cir. 1986), we stated, "[I]t is well established that Title VII, being essentially equitable in nature, does not carry with it the right to trial by jury." (Citations omitted). *Id.* at 7. See also *Del Valle Fontanez v. Aponte*, 660 F. Supp. 145, 148-49 (D.P.R. 1987) (holding that Title VII allows a court to order only "appropriate equitable relief"). But see *Beesley v. Hartford Fire Ins. Co.*, 717 F. Supp. 781, 783 (*Beesley* I), *modified*, 723 F. Supp. 635 (N.D. Ala. 1989) (upholding right of jury trial on Title VII sex discrimination case where requested monetary relief construed as legal remedy) (*Beesley* II). see also *Tull v. United States*, 481 U.S. 412, 417 (1987) (unanimously holding that jury trial is matter of right if cause of action analogous to suit at common law).

Since *Beesley*, the Supreme Court has evaluated the right to a jury trial in an essentially equitable action.

*Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990). The Court delineated a two-part test to distinguish between legal and equitable rights.

> "First, we compare the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull*, *supra*, 481 U.S., at 417-418, 107 S. Ct., at 1835-36 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. [33, 54-55] . . . (1989).

*Id.* at 565 (footnote omitted). It then concluded that the remedy of backpay may constitute a legal right although monetary relief may also be viewed as equitable where the damages are, in fact, a form of restitution and are "'incidental to or intertwined with injunctive relief.'" *Id.* at 570-71 (quoting *Tull*, 481 U.S. at 424).

Such issues as tenure and promotion would generally constitute equitable remedies. See *Brown v. Trustees*, 891 F.2d 337 (Grant of tenure is appropriate Title VII equitable remedy.). In *Jenouri v. WAPA-TV Pegasus Broadcasting*, 747 F. Supp. 118, 120-21 (D.P.R. 1990), the district court did grant a jury trial to a Title VII plaintiff who requested compensatory damages.

In the instant case, the rights requested are primarily equitable-injunctive in nature, requiring promotion and reinstatement, including backpay. Hence, a jury trial does not seem to be required under *Terry*. Still, when we vacated the district court's ruling granting summary

judgment to Roche against Rossy, we stated that on remand "[d]ifferences in qualifications between Rossy and Freyre can be considered by the jury in determining if the decision to promote Freyre . . . was unreasonable or arbitrary." *Rossy*, 880 F.2d at 625 (emphasis added). It would appear that we were alluding generally to the role of a jury as fact-finder and not mandating a jury trial in this case. The First Circuit still adheres to its long-held rule precluding jury trials for equitable remedies under Title VII. This has been reinforced by the Court's analysis in *Terry*. Hence, the plaintiffs were not entitled to a jury trial under their Title VII equitable claims.

## V. Issue of Pendent State Claims

In the first district court decision in 1988, Ramos' and Rossy's pendent state claims under 9 L.P.R.A. § 146 were dismissed as time-barred. *Ramos* I, 694 F. Supp. at 1027. These claims were not reintroduced in the court below at the time of the October 1990 trial on the plaintiffs' sex discrimination and retaliation claims.

The Supreme Court has specified that Title VII was designed to supplement, not supplant, existing laws and that Congress intended for an individual to pursue rights under both state and federal applicable statutes, as well as Title VII. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-49 (1974). These appellants have, however, twice relinquished such an opportunity. First, their initial attempt to file under Puerto Rican law was adjudged time-barred. Second, they did not articulate this issue in the district court at their trial.

In the words of a recent opinion rejecting consideration of an issue for the first time on appeal, were

stated:

> We have applied this proposition in well over a hundred cases since *Johnston v. Holiday Inns*, 595 F.2d 890 (1st Cir. 1979). We therefore are confined to determining whether or not this is a case "where a gross miscarriage of justice would occur" . . . . [and where] the new ground [is] "so compelling as virtually to insure appellant's success." *Id.* at 894 (citations omitted).

*United States v. M'Mahon*, No. 90-2086, slip op. at 6 (1st Cir. May 23, 1991) (*per curiam*) (quoting *Hernández-Hernández v. United States*. 904 F.2d 758, 763 (1st Cir. 1990)). There is no compelling new issue to demand our reevaluation of the plaintiffs' state claims at this late date.

## VI. Issue of Amended Complaint

Appellants have listed as the second of their four issues whether the district court erred in denying their request to file an amended complaint detailing further acts of discrimination. There is, however, no elucidation or development of this issue in their brief. Current case law on our circuit would suggest that any issue which is merely mentioned but not briefed is considered waived on appeal. In *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1 (1st Cir. 1983), we held that "an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed" and that an appellant "generally may not preserve a claim merely by referring to it in a reply brief or at oral argument." *Id.* at 3.

While plaintiffs' reference to their aborted amended complaint is headlined on page 1 of their brief under

"Restatement of the issues," it is never again mentioned in their forty-eight page brief. There is no reply brief. More recently, in another Title VII case, we have insisted on adherence to Fed. R. App. P. 28(a), which specifies that a brief must contain a full statement of issues presented and an accompanying argument with respect to them. *Brown v. Trustees*, 891 F.2d at 352. See also *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) ("It is settled in this circuit that issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned."); *Ortega Cabrera v. Bayamón*, 562 F.2d 91, 102 n.10 (1st Cir. 1977) (any issue not argued on appeal deemed waived). We therefore consider the issue waived.

## VII. Conclusion

We affirm the conclusions of the district court in dismissing the charges of discrimination and retaliation. Costs on appeal to appellee.

United States District Court
District of Puerto Rico

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|---|---|
| NIXA RAMOS, ET AL., Plaintiffs, v. ROCHE PRODUCTS, INC., Defendant. | Civil No. 87-01442 (JAF) |

JUDGMENT

Based on the findings of fact and conclusions of law made by the court at a bench ruling announced today, judgment is hereby entered dismissing the sex discrimination claim of Julie Rossy and the retaliation claim of Nixa Ramos.

This case is now closed for all purposes.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 5th day of October, 1990.

/s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

* * *

*** OCTOBER 4, 1990 ***

THE COURT: Is there any point that either party wishes to argue briefly for about five minutes, or some point you want to highlight? Plaintiffs?

MR. SANTIAGO: We just want to call the Court's attention to the fact that Mr. Brown, in his deposition, said that the ranking in 1988 was not made. And the ranking itself, the piece of paper, is not signed by him. The ranking which, as an exhibit, it has Mr. Brown's name on it but it has not, it doesn't have his signature.

THE COURT: Okay. The defendants?

MR. ANTONETTI: No, your Honor.

THE COURT: Let me see the Brown deposition again.

Well, you people know that I had an opportunity of taking a look at this record in the context of a Motion for Summary Judgment some time ago. The decision that I entered on said occasion appears published at 694 F.Supp., at page 1018.

The Circuit Court reviewed my disposition of the case on that occasion and remanded the case for an actual trial. The Court of Appeals called the case a close one, and said that when you have such a close case the best thing to do is not to hasten and decide by Summary Judgment, and perhaps hear the parties, hear the evidence to see what unfolds.

The Circuit Opinion appears published at 880 F.2d page 621. It was a decision entered in 1989.

So, actually, what I did when I sat here to hear the evidence was look at what I did originally, look at the suggestions by the circuit Court and the concerns that the

Circuit Court had, and then try, of course, to sort it out after hearing the evidence here.

Let me start by saying something about the standard of review that a District court must use to deal with cases of this nature.

The claim by Julie Rossy, to begin with, is a claim for discrimination on the basis of gender, on the basis of sex, the fact that she is a female.

The claim is that the selection process at Roche was kind of manipulated, kind of rigged to discriminate against her in favor of Ruben Freyre, who was a rival, in the good sense of the word, another competetor[sic] for the position of Director of Quality Control, at the beginning, in late '82 or beginning of '83, more or less.

She claims that the fact that she is a female was the motivating factor for not promoting her to the position of Director of Quality Control at Roche's plant in Manati, Puerto Rico.

In a case like this one, in a disparate treatment case, the Court's inquiry has to focus on plaintiffs' complaint that she was treated unfairly. That means less favorbly[sic] than others, because of that legally safeguarded attribute, which is the fact that she is a female.

Absent direct proof of discrimination of the kind that you can actually pinpoint, or the kind that you can actually fully identify -- and I think that everybody agrees that there is no direct evidence in this record, no evidence that you can say this is exactly the evidence of discrimination, of that kind -- absent proof of invidious discrimination, so to say, and none appears on this record, the plaintiffs' case must be examined in light of the famous *M'Donnell Douglas* model, which is the, what I think is the leading case on

Supreme Court jurisprudence on this matter.

Of course, you have to adapt the *M<sup>c</sup>Donnell Douglas* model to the particular circumstances of each case. All cases are not the same. And when we adapt the model, of course, you know that the Circuits have done this before, it is not an invention of ours, the plaintiff had to show that she was a member of a protected class, which she did show; that she was qualified for the position of Director of Quality Control, which nobody disputes, everybody was in agreement about the fact that Julie Rossy and Ruben Freyre were, in that sense, competitors for that position.

Three, she has to prove that she was not hired in spite of her qualifications, and that comes out of the evidence. And, four, that the job was given to a person outside the protected group. That is the last thing.

It is like a first turn of evidence, so to say, or a first level of proof that is required.

And this plaintiff is a woman. She proved the fact that she is a member of the protected class. It was not difficult to prove that.

She proved that she was qualified for the position. I don't think that any body seriously argues that she was not qualified.

She proved that she was no hired despite her qualifications, and she also proved that Ruben Freyre is a male and he was the one hired.

As a matter of fact, the District Court opinion, at the time we ruled on the Motion for Summary Judgment, and the Circuit opinion which guided us thereafter, took it for granted that this was the case.

Once Rossy succeeded in establishing her *prima facie* case, the burden shifted To Roche to prove, to

produce evidence that Julie Rossy lost out in this bid for the position of Director of Quality Control for some nondiscriminatory reason.

We know that the defendant, the company, in such a case, need not persuade the Court that they were not actually motivated by the proffered reason. It is sufficient if the evidence raises a genuine issue of fact as to whether they purposefully discriminated against the plaintiff.

If we put it in a different fashion, the explanation provided must be legally sufficient to justify a judgment in the defendant's favor.

We received a lot of evidence on that. As a matter of fact, if we quantify the time spent in looking at this evidence, it seems to me that the majority of the evidence was Roche producing such evidence, whatever evidence they had, through the testimony of the same plaintiff and the testimony of others. And it seems to me that the burden of production was met by Roche in that sense.

There was ample evidence extracted from the cross-examination of the plaintiff herself. And from the testimony of M[ac]Mullan, who perhaps put it in better perspective than anybody, the famous security certificate, and from James Leonard, who was the person who was most involved, in my own mind, in making that original decision to the effect that it was the management's appraisal that Freyre was better qualified in the eyes of Roche than Rossy for the job.

The articulation of a legitimate nondiscrimnatory[sic] reason for hiring Freyre over Rossy sufficed to erase the presumption raised by plaintiffs' *prima facie* case. As a matter of fact, the plaintiff knew long before she entered the trial that it was her burden, at a given point in time, of

course, in the context of the case, in the context of the trial, unaided by the original presumption, to show that the defendant's reasons were pretext for discrimination.

In all honesty, I do not think that any reader of this record can find that she met this burden, that Rossy met this burden, even under the most liberal view that a fact-finder can give to the evidence received here.

Let me point out some things which I think are important.

You will remember that at the beginning, perhaps I, myself, had a confusion, and the Circuit also had a confusion as to the nature of the original degree that both these competitors had. This was clarified through the process of receiving evidence. And Frali's[sic] Bachelor of Science Degree in Chemistry, I think, was, everybody seemed to agree, was more useful in a scientific field or scientific context, like the one at Manati, at the plant at Roche, than Rosi's[sic] Bachelor of Arts Degree with a major in Biology.

A point was attempted by Mr. Santiago, as to the kind of entity that granted the degrees. Basically, the argument made through the evidence was the degree, a Bachelor of Arts Degree with a major in biology from the University of Puerto Rico is a better degree than a Universidad Central degree in Science and Chemistry. But I don't think that I should even go into that.

It was at those moments in time that I felt that this evidence really was not helping much. It was really stressing out other factors that I will discuss later.

I don't think that we should say, from the standpoint of Title 7, that he who goes to Harvard Law School or Harvard Business School is better qualified than the person

who goes to the University of Puerto Rico. You never know. It all depends on the person. And there are so many other factors involved in this kind of thing that there may be a particular liking for one university over the other. But that, alone, cannot be the basis for a court to intervene in a Title 7 situation.

Even though both professionals involved in this particular case possessed good professional evaluations, you know, excellent, in the good sense of the word, is the kind of employee you would like to have around you, both of you. It seems to me that the evidence that I have before me seems to describe Freyre as being better ranked than Julie Rossy. All within, of course, the evaluation procedures that were in full force and effect at Roche. And I have not received any evidence that there is something inherently wrong and bad from the standpoint of Title 7 with the ranking or evaluation systems.

I feel that this evidence shows that Freyre was more of a scientist manager. Rossy was more of a manager, and, arguably, you could say that she had, on this record, I just don't know what is the reality, on this record she apparently had less pharmecutically[sic] related laboratory experience. That is my feel from the evidence received.

The extensive facts provided under the evidence received by both the plaintiff and the defendant show, in my humble opinion, that sex was not the basis under which Roche decided to promote Freyre to that directorship position over Rossy.

It seems, on this record, that Roche's choice was merely a matter of management preference conducted after a thorough review of both candidates' background, which included a kind of written test, or request of a presentation,

so to say, touching upon their plan of action to make the Quality Control Department a more efficient place, if given the job.

Under this evidence Rossy was unable to show that Roche articulated a pretext for some hidden gender based discrimination.

There is no evidence in the number of exhibits received by the Court tending to show that gender played any role in the decision to promote Freyre over Rossy.

Basically, what we have before us is a genuine request by Rossy. She feels that she is qualified and that she should be given the job. I have no doubt in my mind that she feels this. And perhaps myself or somebody else would have appointed her. I just don't know. She could, perhaps, have done a very good job, too.

That is not the issue. The problem is the way this has been presented to the Court. What these parties are asking or what the plaintiff is asking is for us to basically second-guess or pass upon the wisdom of the management prerogative of appointing Freyre over Rossy.

I know and you people know that Title 7 was not intended, should not be used to diminish traditional management prerogatives. And there is plenty of case law that says we as judges cannot set ourselves up as personal evaluators and remake the choice for somebody else. As a matter of fact, the law forbids us from reweighing the credentials of people for the purpose of granting relief. It is not our duty to second-guess, nor should we engage in that conduct in reviewing this kind of management personnel decisions, where there is no hint of improper motive.

At this point I want to say something. I always tell

jurors in civil cases that there are various truths in a case. The truth may be what plaintiffs really think is the truth. The truth may be what the defendant thinks is the truth. The truth may be what the jury or the judge may find. We were not there. I was not working at Roche. I was not looking through a hole to see what happened. I have to go by what is brought before me. And I cannot honestly say that there are hints here of improper motives as to Rossy.

Therefore, our original findings of August 30, 1988, which is the District Court Opinion that I mentioned, the publication citation, seems to be confirmed in that sense. Roche's selection of Freyre was nothing more than a decision made on the basis of educational background as it relates to the scientific field, work experience with Roche, exposure to a variety of work-related scenarios while working at Roche, and performance evaluations.

There should be no doubt that in the mind of an independent reviewer, Rosi's[sic] Bachelor's Degree in Art with a major in biology is, I don't want to use the word "inferior," because I don't think it is inferior; the word should be, it is less attractive to Roche than the Bachelor's Degree in Science with a major in chemistry that Freyre possessed.

Let's also consider that Freyre is a chemist, licensed chemist, Rossy is not. We have considered Rosi's[sic] Master's Degree in Educational Administration Supervision, but I don't see, I personally don't see how that would have tipped the balance, somehow. Perhaps Frali's[sic] Certified Quality Engineer Deploma[sic], in the context of the evidence received, is more important at that point in time.

It is not a formal degee[sic]. It is simply a certification. But at least it proves proficiency in some

areas of dealing in disciplines that have to deal with, on an ordinary basis, working in a pharmaceutical context. And as we know, we did not receive evidence of any attempt on the part of Rossy to take that test and certify herself, even though in her own mind it was like a Blue Ribbon Club that the enterprise had, and nothing else.

At the most, she could have proved to management that she was fully proficient in those disciplines, and that would, I think, have made a difference.

I should also note that perhaps the postgraduate education leading to a Master's Degree in Industrial Pharmacy were indeed relevant and more useful to Roche in the context of the position of Director of Quality Control.

Going now to the subject of those famous task force projects, the Valium and Dalmane task force projects.

I remember vividly when the evidence was being received that as one party highlighted the intervention of, let's say, Freyre, in the projects, the other party also stressed the point that Rossy also participated in those projects.

There is substantial evidence about the fact that Freyre played leading roles in the so-called Valium and Dalmane validation task forces, where the evidence received, what I have before me only shows that Rossy played secondary roles in these two task forces.

On the subject of the Law Degree, I honestly cannot find, on the evidence here before me, that this Law Degree was of any use to Roche within the Quality Control Department context.

And what happened in 1989, when Adalberto Ramirez was appointed to the position of Director of Quality Control when Freyre left Roche, seems to be a

repetition of the same process.

The record is quite clear about the fact that Adalberto Ramirez became Director of Quality Control because managers, those in charge and passing upon these matters, were convinced, whether true or not is a different story, whether it was in the best interest of Roche or not, it is not for us to second-guess, that Ramirez was a better choice for the position on the basis of education, qualification, exposure, *et cetera*.

We now turn to the Nixa Ramos case, which is a difficult case, too. It is a claim for retaliation. A retaliation claim in the context of this case, in my own mind, should be treated somehow like a disparate treatment case. And that, of course, will be beneficial to Nixa Ramos.

The plaintiff must allege that she engaged in statutorily protected activity by backing up Julie Rosi's[sic] claim before the EEOC, and obviously being available to testify in this case, and as a result she suffered adverse employment action, and that there was a causal connection between the employee's action and the harm suffered.

By treating her case like a disparate treatment case, we favor Nixa Ramos with certain presumptions.

You remember that at a given point in time during the presentation of evidence, I said, and I wrote a note right here in my notebook that says, there is a quote, this is the note. "There is a veiled claim of disparate treatment underlying the retaliation claim."

And what I meant to say was, in my note, is that as the evidence unfolded I saw that Nixa Ramos, when she was passed over and not considered for manager, at the time that Berberena was appointed in '83 -- was it '83,

'84, around there somewhere -- I think that she felt that she should have gotten that job. Nothing wrong with that. A legitimate aspiration.

As a matter of fact, I saw in the evidence that in her own mind, her problems with the company started then. And it simply culminated with the retaliation claim.

Therefore, I have decided to treat the retaliation claim in a way favorable to her, and I have found the following:

She is a woman. We know that women are discriminated against. That happens. That is why we have the law. She had excellent evaluations, in the generic sence[sic], could have been very good, good evaluations.

We saw that latent disparate treatment claim because of the appointment of Berberena as Quality Assurance Manager. And as we received the evidence we said to ourselves, "We are going to presume, for the sake of argument, that there has been some retaliation here because she is a woman, because she really wanted that position that was given to a man, Mr. Berberena, and because she supported Rossy before the EEOC and the Court here." Let's assume that she proved the *prima facie* case, too, in that sense.

But when we received the evidence on what happened, aside from that presumption or that *prima facie* case, we have to only find that the evidence of retaliation, which is her case in chief, her case properly before the Court, was also rebuttal.

At the time that Julie Rossy filed her EEOC Complaint, she announced that Nixa Ramos, along with two other persons, also employees of Roche, would serve as her witness in proving sex discrimination.

I cannot legally find in this record that the two other employees were rataliated[sic] against.

Even the testimony of Carrillo, yesterday, shows he stayed there nine years after this whole incident. He was very sincere in saying that he perceived in his own mind that the treatment was different, but he couldn't honestly point his finger at anything in particular.

We have also examined the affidavit that Nixa Ramos gave in support of July[sic] Rossy. The affidavit does not contain grave imputations against Roche of the kind that would implicate some other manager or the higher echelons of the company into something really nasty and bad looking, that would indeed trigger retaliation, as things unfold and happen in the real world context. I don't think that affidavit is that sensitive so as to be of the kind that would trigger retaliation because people were put in a very bad light kind of thing. That is not present in this record.

And Nixa claims she was doing fine as a Roche employee until this occurred, and apparently she was doing fine. But as she testified, and she started to tell us about how she was demoted from Quality Assurance Group Supervisor to Good Manufacturing Practices Training Supervisor and to Quality Assurance Specialist, I could perceive something in that demeanor that hinted I should look into this matter carefully.

The evidence unfolded, and what I find is that she was not promoted to that management position in '83, which was given to Berberena. She worked closely to Julie Rossy and she felt a common cause with Julie Rossy. Nothing wrong with that either. She felt that these changes in her jobs were demotions, when I don't have evidence that they were demotions. As a matter of fact, what I have is

evidence that even though the jobs changed, the salary increased at a given point in time and, thereafter, did not change at all.

Not only that, in 1984, when Roche abolished the Group Supervisor position, which was a recommendation made by Rossy and another candidate, Freyre, I think it was, she could have been laid off, and it would have been an excellent opportunity to get rid of her nicely, and that she was not laid off.

The evidence is that there were no other vacant positions she could occupy, and the company created this Good Manufacturing Practices Supervisor's position which was offered to her.

She retained the same salary, same benefits to which she was otherwise entitled, and it is here where she starts to have problems in her performance. It is reflected in her evaluations, from a good employee she started to show as not that good of an employee.

My impression, from the evidence received, from the demeanor, from the way she expressed her claim, is that she was indeed dissatisfied, disgruntled, because she did not make manager, and that that dissatisfaction affected her performance in the jobs she held thereafter. Her mind was not on what she was doing.

The records show that even though her evaluations were constantly poor after 1984 she was giving a series of opportunities, a probationary period, which she failed. She could have been fired then, she was not. An extended probationary period, which she also failed. She could have been fired, she was not fired. And an eventual change to the last position she held, that of Quality Assurance Specialist, supervision by two different persons, both of

which coincided in the fact that her performance was indeed poor and below standard, and eventually was fired for it in 1989.

I do not think that this record allows me to conclude that the explanation given by Roche for the eventual firing and for those evaluations that were below standard, were a pretext to hide invidious sex discrimination or unjust retaliation for the fact that she backed up Rossy.

It seems to me that the only thing that I can do on this record is to dismiss the complaint filed by both plaintiffs, and that is what I will do.

One thing that bothers me is the following:

All of us work in the context of units of employment which contain more than one employee. We have people under our direct supervision. For people, even though not under our direct supervision, we have to work with them and deal with them. And that happens in the context of all positions that I can think of, from President of the United States down to anything, private industry, in the commercial sector, in government, no matter what.

My concern is what is going to happen now that this case has been decided. I only hope, and this is, of course, by way of advice from an outside point of view, I only hope that this will not mean that Rosi's[sic] days in Roche are finished, by any means. I think that she should be motivated more than ever to aspire to other positions and to do her best. And I also hope that management will allow her to do that.

If Title 7 litigation is going to have a chilling effect, even though the plaintiffs lose, then we have a big problem. And I don't think this legislation was intended to have that kind of chilling effect, and I urge the parties here to re-

examine their respective views toward their employment, employees, and do the best to work jointly together towards the achievement of the common goal, which is the best of employees, the best of pharmaceutical companies, and that is the kind of thing I expect to see here.

Any additional requests for findings? Defendants?

MR. ANTONETTI: No, your Honor.

THE COURT: Plaintiffs?

MR. SANTIAGO: We would like to file them in writing, your Honor.

THE COURT: Very well, you can do that. There is a term. I will enter a judgment based on this bench ruling. The judgment will be entered today. Mr. Cook will transcribe this bench ruling at the cost of the parties, and the same will be filed after I review the same for gramatical[sic] errors, more than anything else, or sense. When a bench ruling is given, sometimes the judge has to review it, and if I change anything I will let you know.

That will be it. The parties are now excused. Thank you very much.

United States District Court
District of Puerto Rico

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| NIXA RAMOS, ET AL., Plaintiffs, v. ROCHE PRODUCTS, INC., Defendant. | Civil No. 87-01442 (JAF) |

**ORDER**

Before the court is defendant's "Motion for Partial Dismissal and to Strike Jury Demand." Docket Document No. 79. Said motion is largely an attempt to prune the amended complaints (Docket Document Nos. 63 and 65) in this consolidated action of matters that have already been dismissed or were otherwise disallowed in previous orders, particularly two orders entered on March 23, 1988 and an opinion and order entered on August 26, 1988. See *Ramos v. Roche Products, Inc.*, 694 F.Supp. 1018 (D.P.R. 1988), vacated in part by *Rossy v. Roche Products, Inc.*, 880 F.2d 621 (1st Cir. 1989). [1] Defendants also seek dismissal of allegations raised for the first time in the amended

[1] Because the *Roche Products* opinions, both at the district and circuit levels, provide a thorough background of this litigation, we will not review the same here.

complaint. Plaintiffs have opposed only those portions of defendant's motion seeking to strike the jury demand and to dismiss the Law 100 claims. The court rules as follows.

1. The amended complaint contains a demand for a jury trial. In a previous order this court ruled that jury trials are not available in Title VII cases. This holding was based on clear First Circuit precedent. See *Olin v. Prudential Co. of America*, 798 F.2d 1, 7 (1st Cir. 1986). The authorities cited by plaintiff do not persuade the court to alter this view. The motion to strike the jury demand from the amended complaints is therefore GRANTED.

2. The amended complaint also contains a cause of action under 42 U.S.C. section 1981, as well as a claim for compensatory and punitive damages (as opposed to equitable relief) under Title VII. Both of these claims were dismissed in this court's order of March 23, 1988. Docket No. 12. Therefore, the motion to strike them from the amended complaint is also GRANTED.

3. In the opinion and order of August 26, 1988, this court dismissed the following aspects of plaintiffs' case: a) all allegations as to diversity of citizenship; b) the Title VII claims of Abel Rossy and the conjugal partnership formed between him and plaintiff Julie Rossy; c) the plaintiffs' claims under Law 100, 29 L.P.R.A. § 146, based on events occurring in 1983; d) plaintiff Ramos' Title VII claim based on sex discrimination in regard to events occurring in 1983. None of these determinations were appealed, yet miraculously they have been revived in the amended complaint. Again, plaintiffs have not attempted to justify their inclusion and so the motion to strike them is GRANTED.

4. The amended complaint also contains allegations

raised here for the first time. Specifically, plaintiff Ramos alleges sex discrimination based on events occurring in 1989, and plaintiff Rossy alleges unlawful retaliation based on events occurring in 1988. Defendants argue that these new claims should be dismissed for failure to exhaust administrative remedies. See *Ramos*, 694 F.Supp. at 1025. Plaintiffs have not opposed, and the court is not inclined at this stage to do their work for them.[2] Therefore, these new allegations are also DISMISSED.

Thus pruned, this case will proceed to trial on Rossy's claim of sex discrimination and Ramos' claim of retaliation.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 16th day of May, 1990.

/s/ JOSÉ ANTONIO FUSTÉ
JOSÉ ANTONIO FUSTÉ

U.S. District Judge

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[2] This litigation, filed in October 1987, is slouching toward its third birthday. It is not a complicated case. In the opinion and order of August 26, 1988, we characterized the work submitted by all parties thus far as "voluminous, clumsy, repetitive, and largely irrelevant . . . . " *Ramos*, 694 F.Supp at 1020. Now, the fact that plaintiffs 1) filed an amended complaint realleging causes of action long ago dismissed, and 2) did not defend their new assertions, fails to inspire the court with the confidence needed to welcome new allegations at this time.

# United States Court of Appeals
# For the First Circuit

No. 88-2085

JULIE ROSSY, ET AL.

Plaintiffs, Appellants,

v.

ROCHE PRODUCTS INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jose Antonio Fuste, U.S. District Judge]

Before

Breyer and Torruella, Circuit Judges,
and Caffrey,* Senior District Judge.

A. Santiago-Villalonga with whom Law Offices of Nachman & Fernandez-Sein was on brief for appellants.
David A. Copus with whom Donald B. Ayer, James

* Of the District of Massachusetts, sitting by designation.

E. Anklam, Jones, Day, Reavis & Pogue, Luis Antonetti and Goldman & Antonetti were on brief for appellee.

August 4, 1989

TORRUELLA, Circuit Judge. Julie Rossy ("Rossy"), plaintiff below, appeals from the district court's grant of summary judgment in favor of defendants. Rossy brought this action alleging sex discrimination under *Section 704(a)* of *Title VII* of the *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000e to 2000e-17.

Rossy alleges that, although she was well-qualified, she was denied a promotion to the position of Director of Quality Control by her employer, Roche Products, Inc. ("Roche"), solely because of her gender. The district court found that Rossy had put forth a *prima facie* case of sex discrimination. Nevertheless, the court granted defendants' motion for summary judgment because it found that Rossy presented insufficient evidence to rebut Roche's legitimate explanation for the personnel decision. *Ramos v. Roche Products, Inc.*, 694 F. Supp. 1018 (D.P.R. 1988).

We will, of course, review the facts in the light most favorable to the plaintiff. *Menard v. First Security Services Corp.*, 848 F.2d 281, 283 (1st Cir. 1988). Rossy began working for Roche in 1976, the year in which Roche began its Puerto Rico pharmaceuticals operations. Roche also hired Rubén Freyre, the man who was promoted to the position for which Rossy aspired, later that same year.

Rossy studied at the University of Puerto Rico and received her Bachelor of Arts degree in natural sciences in 1968. The parties disagree as to the focus of this degree, whether it was on education or science. She also has a

Masters degree in Educational Administration and Supervision from the University of Bridgeport. After beginning work at Roche, Rossy went back to school to get a law degree. Roche paid for these courses, which Rossy argues were relevant to her position because of the regulatory affairs aspect of pharmaceutical work.

Freyre received a Bachelor of Science degree in Chemistry from the Universidad Central in 1975. He was honored with an award for the best chemistry student at the university. Freyre also took graduate courses in Industrial Pharmacy at the University of Puerto Rico. Rossy argues that Freyre's college is not as competitive as the University of Puerto Rico. Although Roche has stated that it considers a degree in chemistry to be more relevant to the position at issue than Rossy's degrees, Rossy points to many Roche employees at similar or higher positions that do not have straight science degrees.

Rossy was hired originally as Quality Control Administrative Manager, but soon thereafter was given the position of Quality Control Administration and Assurance Manager retroactive to her starting date. She was asked to go to New Jersey for training and finished the twenty-nine week program in only nineteen weeks, after having received excellent evaluations.

Freyre was hired as Quality Control Laboratory Supervisor and was promoted to the position of Manager of Quality Assurance. Upon this promotion, Rossy's prior responsibilities in quality assurance were transferred to Freyre. Rossy's title then changed to Manager of Administrative Services. Freyre worked a great deal of overtime and although not required for advancement, he studied for and passed the Certified Quality Engineering

(CQE) exam and received a CQE certificate. Rossy never took this course. The job description of Director of Quality Control was amended a few weeks before the final hiring decision to state that the CQE certificate was "desirable, but not obligatory" for the position. All employees within the Quality Control Department had been encouraged to obtain the CQE certificate.

Both employees received annual evaluations of their work at Roche. Both consistently received "excellent" evaluations, but only Freyre was rated as "exceptional" on a few occasions. Rossy argues, however, that these differences in ratings should be discounted because Rossy had significantly greater responsibilities at that time. Also, all nineteen managers were ranked in two categories by Roche's directors and Freyre was ranked higher than Rossy in both Individual Contribution and Job Knowledge.

Freyre and Rossy were considered the only two viable candidates for the Director position and as part of the decision-making process were asked to complete reports, stating recommendations for the Quality Assurance department and a workable future plan. Although both reports were well-written, Freyre's report was found by Roche to be more helpful because it contained "concrete and specific" projections. *Ramos*, 694 F. Supp. at 1023.

Also, it appears from the record that the job title and description of the Director's position may have been changed at some point after defendant had identified Rossy and Freyre as the two candidates for the position. The title and responsibilities were changed to remove the regulatory affairs aspect of the position. Moreover, the recommended educational background for the position was changed from a doctoral or equivalent degree to a bachelors degree in

science with some relevant graduate work. Rossy argues that these changes, along with the additional statement the CQE certificate was recommended for the position, were made solely to better tailor the position to Freyre's qualifications.

Roche has reported since 1971 that there exists an underutilization of women in the Officials and Managers 1 category, which includes all director positions. Rossy claims that at the time of Freyre's promotion the underutilization occurred with an 18.3% availability of women in the labor pool. Up to this point, there have never been any female directors at Roche.

After Freyre was promoted, Rossy filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC found that there was reasonable cause to believe there was a Title VII violation and issued a right-to-sue letter. Rossy then brought this action in the district court.

The Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure states that a motion for summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." As we have repeatedly emphasized, however, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). This circuit has defined a "genuine issue of material fact" as that which "'might affect the outcome of

the suit under the governing law.' . . . In other words, 'in a run-of-the-mill civil case,' the court must ask 'whether a fairminded jury could return a verdict for the plaintiff on the evidence presented. '" *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 894 (1st Cir. 1988) (quoting *Anderson*, 477 U.S. at 248, 252); *accord Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 105 (1st Cir. 1988) ("An issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'") (quoting *Anderson*, 477 U.S. at 248).

In reviewing the trial court's grant of summary judgment, we must review the record in the light most favorable to the non-moving party and must indulge all inferences in favor of that party. *Oliver*, 846 F.2d at 105. We will reverse a grant of summary judgment if there existed any factual issues that needed to be resolved before the legal issues could be decided. *Lipsett*, 846 F.2d at 895.

Lastly, our review will be most searching in cases, such as this, that turn upon the issue of motive or intent. *Id.*; *Oliver*, 846 F.2d at 109 (advocating caution and restraint in this context); *Méndez v. Belton*, 739 F.2d 15, 20 (1st Cir. 1984). These difficult questions are most suited for jury determinations, as proof is generally based on inferences that must be drawn, rather than on the proverbial "smoking gun." "Even in such cases, however, we will not refuse to affirm a grant of summary judgment in favor of the defendant if the plaintiff rests merely upon 'unsupported allegations and speculations.' " *Id.* (quoting *Oliver*, 846 F.2d at 110).

The Title VII Claim

"The inquiry in a Title VII case is whether the

defendant intentionally discriminated against the plaintiff." *Oliver*, 846 F.2d at 106. A plaintiff in a Title VII suit, however, does not have to present direct proof of discriminatory motive in order to prevail. Rather, a *prima facie* case may be established by showing by a preponderance of the evidence that : 1) the plaintiff is within a class protected by Title VII; 2) she applied for and was qualified for the position for which the employer was seeking a replacement; 3) despite her qualifications she was rejected; and 4) after her rejection, the position was filled by a person not within the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Once the plaintiff has proved a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employee's rejection. *Id.* This burden is of production, not persuasion, as "the burden of persuasion on the ultimate issue of intent remains with the plaintiff at all times." *Lipsett*, 864 F.2d at 899. After the defendant has stated such an explanation, the plaintiff must demonstrate that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v.*

*Burdine*, 450 U.S. 248, 253 (1981). [1] This final step may be satisfied "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256 (citation omitted).

Rossy presents no direct evidence of discrimination and therefore the *McDonnell Douglas* framework is appropriate. [2] The district court found that Rossy had made her *prima facie* case by showing that although she was

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[1] These standards have not been changed by the Supreme Court's recent decision in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), in which the Court specifically stated that

> Our holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a *prima facie* case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. . . . [S]ince we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of 'shifting burdens' that we addressed in *Burdine*.

109 S. Ct. at 1788 (citations omitted).

[2] This framework of shifting burdens is inapplicable when the plaintiff presents direct proof of discrimination. *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987).

qualified, a man was promoted instead of her.[3] Roche, however, articulated a legitimate reason for the personnel decision: although both were good candidates, defendant considered Freyre to be better qualified for the position. Our role is not to second-guess the business decisions of an employer, imposing our subjective judgments of which person would best fulfill the responsibilities of a certain job. See *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1024-26 (1st Cir. 1988); *Menard*, 848 F.2d at 287. "While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination." *Loeb*, 600 F.2d at 1012 n.6.[4]

Rossy's ultimate burden was to show that Roche's reason for choosing Freyre was pretext for underlying discriminatory motives. This showing can be accomplished in many different ways. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2378 (1989). In *Patterson*, the Court stated

[petitioner] might seek to demonstrate that respondent's

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[3] Although the *prima facie* case creates a presumption of discrimination, "it is clear that merely making out a *prima facie* case does not automatically save appellant from a summary judgment motion. 'Indeed, the inference of discrimination created by the *prima facie* case is dispelled once the employer's reason is stated, until and unless the latter is shown to be pretext.'" *Dea v. Look*, 810 F.2d 12, 15-16 (1st Cir. 1987) (footnote omitted) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979)).

[4] However, as this court in *Loeb* contained, "[t]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." 600 F.2d at 1012 n.6.

claim to have promoted a better-qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. . . .There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual. Thus, for example, petitioner could . . . [present] evidence of respondent's past treatment of petitioner.

*Id.* Rossy argued below that she was in fact the significantly better qualified candidate. Roche disagrees, contending that Freyre was selected because he was more qualified. The record is not so clear that it would enable the court at this stage to determine the issue. Differences in qualifications between Rossy and Freyre can be considered by the jury in determining if the decision to promote Freyre, allegedly based on qualifications, was unreasonable or arbitrary. If so, the jury could use that evidence as part of the basis for inferring sex discrimination.

Also, Rossy points to the changes in job title and description of the director's position as evidence that the position was tailored for Freyre, which additionally could lead to an inference of discrimination. Roche argues that Rossy's "circumstantial" evidence of discrimination is insufficient to satisfy her burden. they claim that they reorganized the Quality Control department, thus giving Freyre some of Rossy's past responsibilities, only because of the start-up of their Valium production project, with which Freyre was much more familiar.

Roche also discounts the changes made in the Director's job title and description as unimportant. The required educational background, they argue, would not have affected either candidate since, although Freyre did not

have a doctorate or other relevant degree, he had experience equivalent to the degree. Also, the changed description read that the CQE certificate was desirable, but not obligatory, and therefore would not have precluded Rossy from consideration. Lastly, although regulatory affairs was deleted from the job title, Roche argues that this was never a large part of the position and therefore Rossy's legal degree was never very relevant.

This case is admittedly very close. We must disagree, however, with the court below that it is one appropriate for summary judgment. There still exist many factual disputes that are relevant to Rossy's final burden of persuading the court that Freyre's promotion was due to discriminatory intent. All of Roche's explanations may in fact be accurate, but they must be decided after trial, especially in cases such as this where Roche's intent is the central issue. Considering all facts and finding all inferences in Rossy's favor, and based on the evidence currently before us, we conclude that there still exists genuine issues of material fact.

The summary judgment is therefore vacated and this case is remanded for further action consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

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| NIXA RAMOS,<br><br>Plaintiff,<br>v.<br><br>ROCHE PRODUCTS, INC.,<br><br>Defendant. | Civil No. 87-01442 (JAF) |
| JULIE ROSSY, ABEL ROSSY, and the conjugal partnership existing between Julie Rossy and Abel Rossy,<br><br>Plaintiffs,<br>v.<br><br>ROCHE PRODUCTS, INC.,<br><br>Defendant | Civil No. 87-01637 (JAF) |

## OPINION AND ORDER

This is a consolidated action in which plaintiffs allege sexual discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. §§ 2000e to 2000e-17*, and Law 100 of June 30, 1959, *7 L.P.R.A. § 146*. The Title VII claims are bottomed under federal question jurisdiction, and the local claims are based upon

diversity jurisdiction. *28 U.S.C. §§ 1343 and 1332.* Plaintiff Julie Rossy alleges that because of her gender, Roche Products, Inc. ("Roche") failed to promote her to a managerial position given to a less qualified male. Plaintiff Nixa Ramos alleges that Roche failed to give her promotions in retaliation for being a witness in Rossy's sex discrimination claim before the Equal Employment Opportunity Commission ("EEOC"). Before the court are several motions, including summary judgment and dismissal. In ruling on each, we describe the facts as best we are able from the voluminous, clumsy, repetitive, and largely irrelevant record the parties have provided.

## I. GENERAL FACTUAL BACKGROUND

Roche is a pharmaceutical manufacturing concern with operations located in Manatí, and is an employer within the meaning of Title VII. Roche began operations in Puerto Rico in 1976, and hired both plaintiffs in the same year to work in its Quality Control Department. All of the actors in this story, with the exception of top Roche management, worked in the Quality Control Department. Roche hired Rubén Freyre, who Rossy claims is the lesser qualified male, in September of 1976 as Quality Control Laboratory Supervisor, a position he held until April 16, 1980. Roche hired Rossy as the Quality Control Administrative Manager, and supervised, among others, Ramos, who was hired as a Complaints and Stability Technical Writing Coordinator. At the relevant period, Edward A. M[c]Mullan was the Director of Quality Control. Apparently, the managerial hierarchy at Roche begins with Directors, who supervise Managers, who in turn oversee Supervisors. From 1976 to December 31, 1978, Ed Brown

was the Director of Pharmaceutical Operations, and from January 1, 1979 to January 31, 1983, he was the Vice-President and Director of Operations. From August of 1980 to January 31, 1983, Jim Leonard was the President and General Manager of Roche. In 1983, Brown succeeded Leonard as President.

## II. ROSSY'S DISCRIMINATION CLAIM

In a Title VII case, the plaintiff may prove intentional discrimination through direct proof or through facts which support an inference of discrimination. *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 107 (1st Cir. 1988). Where the plaintiff has offered no direct proof of discrimination, as here, her claim must be proven under the directives of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Keyes v. Secretary of the Navy*, No. 87-1707, slip op. at 16 (1st Cir. Aug. 10, 1988).

The Supreme Court, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), outlined the applicable burden of proof in a Title VII case alleging discriminatory treatment, relying on the standard set forth in *McDonnell Douglas*. The plaintiff bears the burden of proving by a preponderance of the evidence a *prima facie* case of sexual discrimination. If the plaintiff meets her initial burden, the burden shifts to the defendant to "articulate some legitimate nondiscriminatory reason" for the adverse personnel decision. *Burdine*, 450 U.S. at 254, (quoting *McDonnell Douglass*[sic], 411 U.S. at 1824). While the burden of production shifts to the defendant, the plaintiff maintains the burden of persuasion throughout the case. As to the defendant's quantum of proof, "[i]t is sufficient if the defendant's evidence raises a genuine issue

of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 255-56. If the defendant satisfies this burden, the burden shifts back to the plaintiff to show that the reasons shown by the defendant "were but a pretext for discrimination." *Burdine*, 450 U.S. at 254 (citations omitted) (citing *M'Donnell Douglas*, 411 U.S. at 802). See also, *Fields v. Clark University*, 817 F.2d 931, 934 (1st Cir. 1987). In order to establish a *prima facie* case, the plaintiff must demonstrate the following: [1]

1. that she belongs to a protected class, here sex;
2. that she applied for an announced, vacant position;
3. that despite her qualifications, she was rejected, and,
4. that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*M'Donnell Douglass*[sic], 411 U.S. at 802; *Oliver*, 846 F.2d at 107; *Keyes*, No. 87-1707, slip op. at 16.

Rossy claims that Roche discriminated against her gender in 1983 by promoting Rubén Freyre instead of her to the position of Director of Quality Control. Roche, in its motion for summary judgment, contends that Freyre was more qualified than plaintiff. Rossy, on the other hand,

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[1] See generally, *Burdine*, 450 U.S. at 254 n.6.

contends that she possessed the better credentials. [2] We find at the outset that plaintiff has demonstrated a *prima facie* case: she is a woman who was under consideration for a vacant position filled by a man despite her fine qualifications. The problem in her case lies with her inability to show that defendant's proffered reasons for Freyre's selection was a pretext for discrimination. As the facts will illustrate, both individuals were the sole competitors to fill an upcoming vacancy as the head of Quality Control, the only division of Roche that both worked in from its start in 1976. In reaching their ultimate ranks within Quality Control, both Rossy and Freyre travelled similar paths through several organizational changes involving both personnel transfers and restructured responsibilities. However, Roche's selection of Freyre was nothing more than a managerial decision after a review of their educational background, work experience with Roche, and performance evaluations.

Both parties submit reams of empirical evidence to prove each professional's superior qualifications. The documentation shows that both possessed similar outstanding job evaluations, though Freyre edged Rossy in work performance and evaluations. They entered Roche with somewhat similar educational backgrounds, though Roche considered Freyre's chemistry degree more valuable than Rossy's degree in Arts and Natural Sciences. The parties agree that both candidates remained equal only in

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[2] A comparison of the qualifications of the two competitors "is not legally required, and the results are, at best, legally inconclusive. Neither the defendants' managerial judgment nor their recruting acumen is on trial in this case." *Keyes*, No. 87-1707, slip op. at 25.

prior work experience.

To begin, Rossy earned her B.A. in Arts in the Natural Sciences Faculty in 1968 from the University of Puerto Rico, and in 1974 received her M.S. in Educational Administration and Supervision from the University of Bridgeport, Connecticut. Later, while working for Roche, in 1982 Rossy obtained a law degree from the Interamerican University. Roche funded her legal education and there is some evidence it intended for her to work at Roche in the area of regulatory affairs as it relates to pharmaceuticals. Freyre received a B.S. in Chemistry from the Universidad Central de Bayamón in 1975, and earned a prize for the best graduate in Chemistry from the Puerto Rico College of Chemists in the same year. While working at Roche, he completed some graduate courses in Industrial Pharmacy at the University of Puerto Rico. Roche initially believed that Rossy earned her degree in Biology, and later learned, at the time that she was under consideration for the promotion to Director of Quality Control, that her degree was actually in arts and sciences. Both were hired to different positions in the Quality Control Department, plaintiff as Quality Control Administrative Manager, and Freyre as Quality Control Laboratory Supervisor.

M[cc]Mullan, the Director of Quality Control, encouraged his employees in Quality Control, as far back as 1978, to obtain a Certified Quality Engineer certificate. He made clear, however, that obtaining the certificate was not a predicate to maintaining a position within Roche. To earn this specialized certificate, an applicant must pass an exam that covers eight major areas of quality control that are relevant to the Department of Quality Control at Roche.

Rossy did not take the exam, but Freyre was one of three associates out of eleven who took and passed the exam in 1979. The record shows that the powers that be in Roche looked favorably upon those who earned the certificate.

Turning to their work history with Roche, in 1981 Roche reorganized the Quality Control Department and named Freyre to the newly created position of Manager of Quality Assurance. This entailed a transfer of all previous responsibility in quality assurance from Rossy to Freyre. In turn, Rossy was named Manager of Administrative Services. In November 1981, the Directors of Roche ranked its nineteen Managers "in terms of contribution to the Company and job knowledge." Ranking of Managers, Defendant's Exhibit 62. The ranking report states that "Mrs. Rossy and Mr. Freyre have been specifically identified while the other managers are coded for obvious reasons . . . However, Mr. Freyre was rated significantly higher than Mrs. Rossy in both categories [of individual contribution and job knowledge.]" *Id.* In Individual Contribution, the Directors ranked Freyre third and Rossy ninth, and in Job Knowledge the directors ranked Freyre fourth and Rossy eighth. *Id.*

With regard to work performance, throughout their tenure in their varying positions within Quality Control, both earned several outstanding annual job evaluations from their respective managers or directors. In 1978 and 1979, Freyre's manager rated him "exceptional," the highest evaluation, in his position as Environmental Laboratory Supervisor. M[ac]Mullan was Freyre's supervisor from 1980 to 1983, and rated him "excellent" in 1980, "exceptional" in 1981, and "excellent" in 1982. From 1977 to 1982

Rossy was rated "excellent" in her annual performance evaluations as Manager of Quality Control, and never obtained a rating of "exceptional."

In 1982 Leonard, the President of Roche, anticipated that M[c]Mullan would soon be leaving Roche and that he would need a new Director of Quality Control. Leonard concluded that Rossy and Freyre were the only viable candidates to replace M[c]Mullan and informed them that they were competing with each other for the position. In July, as part of his evaluation of both, he requested from them a written five-year plan of action for the future of the Quality Control Department. In their reports, both suggested the elimination of the position of Quality Assurance Group Supervisor, held by plaintiff Ramos. Top Roche management considered both candidates' proposals were "well written thoughtful documents," but thought that "Mr. Freyre's projections were more concrete and specific." Plaintiff's Exhibit 4. In December of 1982, Leonard recommended to Brown, who succeeded Leonard as President, that Freyre be appointed Director of Quality Control, taking into consideration their educational background, work experience, job evaluations, special achievements at Roche, management and technical abilities, and Director's opinions. In late December 1982 or early 1983, Brown accepted Leonard's recommendation and replaced M[c]Mullan with Freyre, concluding that in consideration of the above factors, Freyre was better qualified. Brown did not think that Rossy's law degree made her more qualified than Freyre, and concluded that Freyre's chemistry degree was more valuable than Rossy's degree in arts and sciences. Freyre assumed the position

on February 1, 1983 and holds it to this date. Rossy is still employed with Roche as the Manager of Quality Control Administration.

The extensive facts provided by both the plaintiff and defendant show that sex was not the basis under which Roche decided to promote Freyre over Rossy. Roche's choice was merely a matter of management preference, conducted after a thorough review of both candidates' background that included a written test of their leadership abilities and that was made after a considered evaluation by its President and outgoing head of the Quality Control Department.

In sum, Rossy is unable to show that Roche's articulated reason was a pretext for some hidden gender-based discrimination. Furthermore, there is no evidence in these files that tend to show that sex played any role in the decision to promote Freyre over Rossy. Title VII was "not intended to 'diminish traditional management prerogatives.'" *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 260 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). "It is chancy business, indeed, for a court -- on so interstitial a matter -- to set itself up as a super personnel evaluator and attempt to reweigh the credentials of the candidates." *Keyes*, No. 87-1707, slip op. at 22. It is not our duty to, nor should we second guess management's personnel decision where there is no hint of improper motive. Accordingly, summary judgment must be entered in favor of Roche dismissing Rossy's claim for sexual discrimination.

## III. RAMOS' DISCRIMINATION AND RETALIATION CLAIM: BACKGROUND

Ramos asserts that Roche discriminated against her on the basis of sex and in retaliation for being a witness in Rossy's sex discrimination claim. She claims the discrimination and retaliation resulted in the following:

1. Roche's failure to promote her to either Quality Control Lab Manager or Manager of Quality Assurance;
2. her supervisor giving her a rating of only "very good" on her 1983 annual performance evaluation, and
3. Roche's elimination of her job as Group Supervisor and transfer to another position. For the reasons that follow, we dismiss her sex discrimination claim, but leave intact her retaliation claim.

Roche hired Ramos as Quality Assurance Supervisor on October 1, 1976, a position she held until June 18, 1981. Rossy was her manager until about March 5, 1981. Ramos believed she should have been promoted tot he position of Manager of Quality Assurance on March 5, 1981 instead of Freyre. However, Freyre promoted her to Quality Assurance Group Supervisor on June 18, 1981, and she held that position until May 14, 1984. When Rossy filed her EEOC charge in 1983 alleging sexual discrimination, she announced Ramos as a witness. On February 23, 1983, Rossy was deposed in relation to her EEOC charge and announced Ramos as a witness. On September 30, 1983, Ramos executed an affidavit regarding the Rossy case in which she attests, among other things, that the day after the Rossy deposition was taken, Héctor Alvarez, who held a managerial position, called Ramos into his office to discuss the previous day's deposition. Ramos states that "Mr.

Héctor Alvarez called me into his office and asked me if I was aware that Mrs. Rossy announced me as a witness, and if I was aware that I would have to go into a court to declare on her behalf. That he also advised me that nothing would happen to me if I decided to do so."

In early 1983, Freyre selected Héctor Berberena, then Manager of Quality Control Laboratory, to be his replacement as Manager of Quality Assurance. He took that position on March 7, 1983, and became Ramos' manager from thereafter. On July 31, 1984, Berberena transferred Ramos from Group Supervisor, because that position was soon to be eliminated, to GMP Training Supervisor, a position she still holds. In their reports to Leonard regarding the five-year future of Quality Control, both Rossy and Freyre recommended the elimination of the Group Supervisor position. Sometime in early 1983, Freyre selected Mattie Muñoz, a female, to replace Berberena as Manager of Quality Control Laboratories. Berberena rated Ramos "very good" in her annual performance as Group Supervisor on July 14, 1983.

**A. RAMOS' RETALIATION CLAIM**

Title VII, *42 U.S.C. § 2000e-3(a)*, prohibits employer retaliation against its employees because of participation in a Title VII investigation. To prove a *prima facie* case of retaliation, the plaintiff must show that (a) she engaged in activity protected under Title VII; (b) her employer subjected her to adverse employment action, and (c) there exists a causal link between the above two. *Castillo Morales v. Best Finance Corp.*, 652 F.Supp. 412, 415 (D.P.R. 1987). In defendant's motion for summary judgment, Roche maintains that plaintiff fails to establish

a *prima facie* case, and, therefore, her case must fail. However, the above facts illustrate the opposite.

First, in order to engage in protected activity under Title VII, she must have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *42 U.S.C. § 2000e-3(a)*. Quite clearly, under this expansive definition of participation, Ramos participated within the meaning of the statute in Rossy's EEOC discrimination charge in 1983 by executing an affidavit on Rossy's behalf. In that affidavit she attests, among other things, that obtaining a Certified Quality Engineer certificate was not a prerequisite to any promotion, that she believed Rossy was discriminated on account of sex, and that she believed other women at Roche were discriminated on the basis of sex.

Having decided that executing this affidavit constituted participation under subsection a, we now turn to whether she suffered adverse personnel decisions. We similarly find that she has satisfied the second prong of her initial burden. She complains of being passed over for two significant promotions and receiving what she considers an unfavorable annual job performance evaluation. The next and last issue is whether there is a causal connection to these personnel decisions and her participation in Rossy's EEOC charge. We find on this prong there is a genuine issue of a material fact that will require a trial on the merits. Based on the affidavit of Freyre, Roche contends that it made both decisions regarding the promotions before Rossy's February 23, 1983 deposition. However, in Ramos' February 30, 1983 [sic] affidavit, she attests that the day after the Rossy deposition, Héctor Alvarez came

into her office and discussed the deposition, telling her that if she had to go to court, nothing would happen. Clearly, there is a genuine issue as when Roche management knew of Ramos' participation in Rossy's claim, and whether that had anything to do with the personnel decisions. For this reason, the motion for summary judgment on the retaliation claim must be denied.

**B. RAMOS' DISCRIMINATION CLAIM**

However, Ramos' discrimination claim does not fare as well, and must be dismissed on jurisdictional grounds, for failure to exhaust administrative remedies. Her charge before the EEOC contained only the retaliation claims, and did not contain an allegation, now contained in her complaint, that Roche discriminated against her on account of gender.

On June 21, 1983, Ramos filed her EEOC charge alleging two violations: that Roche retaliated against her when Freyre promoted Mattie Muñoz to Quality Control Laboratory Supervisor instead of her, and Roche retaliated when Berberena changed Ramos' evaluation from "excellent" to "very good" on June 14, 1983. This charge did not include a claim for sexual discrimination. On April 16, 1984, she amended the EEOC charge to include the third retaliation claim, that Freyre appointed Berberena to Manager of Quality Assurance instead of her, but the amendment did not include a claim of sexual discrimination. Apparently, Ramos' deposition testimony cited by defendant reveals that the EEOC helped her draft the amendment and her lawyer approved the amendment. Additional deposition testimony indicates that the failure to file the discrimination claim was no oversight, that she and her lawyer decided to

file only the retaliation claim, even though she believed she was the victim of sex discrimination. In the end, Ramos' EEOC charge never alleged a claim for sex discrimination. The EEOC issued a Notice of Right to Sue on her retaliation charge on August 3, 1987. She then filed suit on October 30, 1987, alleging the retaliatory conduct already described and, in addition, asserting that the adverse personnel decisions were also on account of sex.

Filing a charge with the EEOC is a prerequisite to bringing a civil action under Title VII. *42 U.S.C. § 2000e-5(f)(1); Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The nature of the charge before the EEOC will affect the scope of the court's jurisdiction in the civil suit. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The facts alleged in the charge will dictate the nature of the investigation the EEOC will conduct. Because Ramos' amended charge, drafted with the help of her attorney and the EEOC contained facts giving rise to only a retaliation claim, the EEOC would not have investigated a charge of sex discrimination. *Stallcorp v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1051 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 504 (1987). In *Stallcorp*, the plaintiff filed a claim of national origin discrimination with the EEOC, but did not allege age or sex discrimination. The appeals court affirmed a dismissal of her age and sex discrimination claims because of failure to exhaust administrative remedies. *Id.* at 1051. *Contra Flesch v. Eastern Pa. Psychiatric Inst.*, 434 F.Supp. 963, 970 (E.D. Pa. 1977). Because Ramos did not charge before the EEOC a claim of sex discrimination against Roche, and because with the aid of the EEOC and her attorney in drafting an

amended charge she consciously chose to omit sex discrimination as a basis of the charge, she will be precluded from asserting an action based on sex discrimination.

## IV. MOTION TO DISMISS BOTH PLAINTIFFS' DIVERSITY ALLEGATIONS

In plaintiffs' complaints, they allege that the court has jurisdiction over the federal claims pursuant to *29 U.S.C. § 626, section 706 of the Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3)*, and *28 U.S.C. § 1343*. They also allege diversity jurisdiction pursuant to *28 U.S.C. § 1332*. Submitted is defendant's unopposed motions to dismiss the allegations of diversity jurisdiction on the ground that all parties are residents of the Commonwealth of Puerto Rico. We agree, and the motions are granted.

In the complaints, plaintiffs allege they are residents of Puerto Rico and that defendant is a corporation organized under the laws of the Republic of Panama and having a principal place of business outside of Puerto Rico. Attached to defendant's motion is the affidavit of Héctor L. Alvarez, Assistant Vice-President of Roche, in which he attests that Roche is a wholly-owned manufacturing subsidiary of a Panamanian corporation, is licensed to do business in Puerto Rico, and conducts its business only in Puerto Rico. He attests that the two corporations maintain separate corporate structures, business records, tax returns, and financial statements. He further attests that it administers its own pension plan and employee benefits programs, and that its parent has never operated a plant in Puerto Rico.

Based upon these unrebutted representations, the court is satisfied that the two corporations maintain separate

identities, that Roche maintains its own principal place of business, and that its principal and only place of business is Puerto Rico. See *Topp v. Compair, Inc.*, 814 F.2d 830 (1st Cir. 1987). For purposes of diversity jurisdiction, a corporation is both a citizen of the state of incorporation and its principal place of business, *28 U.S.C. § 1332(c).* Because both the plaintiffs and the defendant are citizens of Puerto Rico, complete diversity does not exist. Therefore, the motion to dismiss the diversity allegation must be granted.

## V. MOTION TO DISMISS RAMOS' SPOUSE AND THE CONJUGAL PARTNERSHIP

In this action, Julie Rossy, her spouse Abel Rossy, and the conjugal partnership, sue as plaintiffs. Submitted is defendant's unopposed motion to dismiss the spouse and conjugal partnership on the basis that they have no standing to sue under Title VII. We agree, and grant the motion to dismiss them from the case.

Though Congress intended Title VII to provide a broad foundation to remedy employment discrimination, it did not intend to provide a remedy to a spouse of a plaintiff having no employment connection with the employer. *42 U.S.C. section 2000e-2* only prohibits discrimination arising out of an employment relationship. *Hickley v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1978). It is uncontested that Abel Rossy and the conjugal partnership did not maintain an employer-employee relationship with Roche.

Our conclusion that Abel Rossy and the conjugal partnership have no standing is supported by analogous federal remedial statutes prohibiting employment

discrimination. The substantive provisions in the Age Discrimination in Employment Act, *29 U.S.C. §§ 621 et seq.*, ("ADEA") contain language similar to Title VII in prohibiting discrimination based on age. [3] The ADEA only protects employees. *E.E.O.C. v. Zippo Manufacturing Co.*, 713 F.2d 32 (3rd Cir. 1983). Similarly, the conjugal partnership and spouse have no standing to sue under *42 U.S.C. § 1983* to redress allegations of deprivation of federal constitutional rights in the employment setting. *Hernández v. Almodóvar*, 631 F.Supp. 960 (D.P.R. 1986).

Furthermore, Abel Rossy and the conjugal partnership are not persons "claiming to be aggrieved" within the meaning of *42 U.S.C. § 2000e-5(f)(1)*. Under that section, where a person claiming to be aggrieved filed a charge with the Equal Employment Opportunity Commission ("Commission"), and where the Commission did not enter into a conciliation agreement, that "person claiming to be aggrieved" may bring a civil action against the respondent named in the charge. Julie Rossy filed a charge before the Commission for sex discrimination against the defendant on April 4, 1983. Only she was named in the charge, and Abel Rossy and the conjugal partnership were

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[3] The ADEA provides in pertinent part: "It shall be unlawful for an employer- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." *29 U.S.C. § 623(a)(2)*. The Civil Rights Act provides in pertinent part: "It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." *42 U.S.C. § 2000e-2(a)(1)*.

not included. They are, therefore, not "persons claiming to be aggrieved." They have not complied with the prelitigation administrative requirement of filing a Commission charge as required by section 2000e-5(f)(1), and have no standing to sue.

## VI. MOTION TO DISMISS BOTH PLAINTIFFS' LOCAL CLAIMS

Roche also seeks dismissal of both plaintiffs' local law claims under Law 100 of June 30, 1959, *29 L.P.R.A. § 146*, on the ground they are time-barred. This assertion also remains unrebutted. For the following reasons, the motions are granted, and the local claims are dismissed.

The limitations period for a claim arising under section 146 is one year. *Olmo v. Young and Rubicam*, 110 P.R.R. 965 (1981) (adopting a one-year period in a racial discrimination case under section 146). However, a notification to the Department of Labor and Human Resources containing a charge of employment discrimination is an extrajudicial claim that tolls the statute of limitations. *Secretario del Trabajo y Recursos Humanos v. Finetex Hosiery Co., Inc.*, 86 J.T.S. 13 (1986). See also, *31 L.P.R.A. § 5303*. Nixa Ramos filed a Commission charge on July 28, 1983, and Roche was notified on August 31, 1983. Julie Rossy filed her charge on April 4, 1983, and Roche was notified on June 10, 1983. Both filings tolled the limitations period, and a new one-year period began to run on the date of the filings. However, because both suits were not commenced here until 1987, they are well outside the one-year limitation period. Accordingly, both claims under *29 L.P.R.A. section 146* must be dismissed as time-barred.

**VII.**

To sum up, with regard to Julie Rossy, the court grants the motions to dismiss her sex discrimination claims under Title VII and local law. With regard to Nixa Ramos, the court grants the motions to dismiss her sex discrimination claims under Title VII and local law, but denies the motion to dismiss her retaliation claim under Title VII. The court also grants the motion to dismiss her spouse and conjugal partnership. With regard to both Rossy and Ramos, the court grants the motions to dismiss the diversity allegations in their complaints.

Accordingly, judgment will be entered dismissing the complaint of Julie Rossy, and the trial will proceed only on the retaliation claim of Nixa Ramos.

**IT IS SO ORDERED.**

San Juan, Puerto Rico, this 26th day of August, 1988.

/s/ *José Antonio Fusté*
JOSE ANTONIO FUSTE
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

| | |
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| NIXA RAMOS, ET AL., Plaintiffs, v. ROCHE PRODUCTS, INC., Defendant. | Civil No. 87-01442 (JAF) |

# PARTIAL JUDGMENT

Pursuant to the terms and conditions of an order entered today, judgment is hereby entered dismissing plaintiff's claim for sex discrimination based upon Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. §§ 2000e to 2000e-17*, as well as the local law claims based upon diversity jurisdiction, *28 U.S.C. § 1332*.

This case will proceed to trial on the retaliation claim now pending before the court.

San Juan, Puerto Rico, this 26th day of August, 1988.

/s/ *José Antonio Fusté*
JOSE ANTONIO FUSTE
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

| | |
|---|---|
| NIXA RAMOS, ET AL., Plaintiffs, v. ROCHE PRODUCTS, INC., Defendant. | Civil No. 87-01442 (JAF) |

**ORDER**

Trial in this case shall be held on November 1, **1988, at 9:00 A.M.**

**IT IS SO ORDERED.**

San Juan, Puerto Rico, this 26th day of August, 1988.

/s/ *José Antonio Fusté*
JOSE ANTONIO FUSTE
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

JULIE ROSSY, ABEL ROSSY, and the conjugal partnership existing between Julie Rossy and Abel Rossy,

Plaintiffs,

v.

ROCHE PRODUCTS, INC.,

Defendant.

Civil No. 87-01637 (JAF)

# JUDGMENT

Pursuant to the terms and conditions of an order entered today, judgment is hereby entered dismissing plaintiff Julie Rossy's claim for sex discrimination based upon Title VII of the Civil Rights Act of 1964, as amended, *42 U.S.C. §§ 2000e to 2000e-17*, as well as the local law claims based upon diversity jurisdiction, *28 U.S.C. § 1332*.

In addition, the action instituted by Abel Rossy and the conjugal partnership between Julie Rossy and Abel Rossy is also dismissed, inasmuch as they have no standing to sue under Title VII of the Civil Rights Act of 1964.

This case is now closed for all material purposes.

San Juan, Puerto Rico, this 26th day of August, 1988.

/s/ *José Antonio Fusté*
JOSE ANTONIO FUSTE
U. S. District Judge

IN THE SUPERIOR COURT OF PUERTO RICO
ARECIBO PART

| | |
|---|---|
| JULIA ROBLES DE ROSSY,<br>DEMANDANTE,<br>VS.<br>ROCHE PRODUCTS, INC.,<br>DEMANDADO. | CIVIL NO. CS83-304<br>ABOUT:<br>CIVIL ACTION |

## JUDGMENT

The dismissal of this case is decreed for having been transferred to the Federal Court and later, by it, to the administrative sphere, that is, to the Equal Employment Opportunity Commission, New York office. Without prejudice.

Given in Arecibo, Puerto Rico, on January 22, 1985.

/s/ *Luis Raúl Cruz Jiménez*
LUIS RAUL CRUZ JIMENEZ
SUPERIOR JUDGE

CERTIFIED TRANSLATION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007

Ms. Julie Rossy
Eugenio Duarte D-3
Urb. La Milagrossa[sic]
Bayamón, P.R. 00619

Charge No. 021-83-3108

Charging Party

Roche Products, Inc.
State Road #670
Monati,[sic] Puerto Rico 00701 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

The respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness and all other jurisdictional requirements have been met.

The charging Party alleges that Respondent discriminated against her because of her sex (female) by refusing to promote her and that Respondent discriminates against females as a class because of their sex by denying them management positions, in violation of Title VII.

The Respondent denies the allegations.

It is undisputed that Charging Party was hired by Respondent in May 1976 as Quality Control Administrative Manager, Grade 7. During her tenure with Respondent, Charging Party has received all excellent performance evaluations and several changes in job title. In January

1983, she occupied the position of Manager of Administrative Services, Grade 7.

Charging Party contends that on February 1, 1983, Respondent refused to promote her to the position of Director of Quality Control and Regulatory Affairs and instead changed the job title to Director of Quality Control and promoted a less qualified male to the position.

Respondent acknowledges the fact that Charging Party and the male were the two principal candidates for the position, but, Respondent maintains that the male was selected because he was determined to be better qualified for the position than the Charging Party.

Respondent also acknowledges that the former male encumbent[sic] in the position held the title Director of Quality Control and Regulatory Affairs, however, Respondent asserts that Charging Party was not offered the position of Manager of Regulatory Affair[sic], but states instead that this position was discussed with her as a possible alternative position in which she might have been interested.

According to Respondent, in making the decision between the Charging Party and the male, it considered their written presentations; technical qualifications; job histories; and their accomplishments.

Respondent asserts that in the area of written presentations both candidates were rated as having produced equally well done work, whereas, the male was rated superior in technical qualifications, job history and accomplishments.

With respect to technical qualifications, the record shows that Charging Party has a B.A. in Biology, a M.S. in Administration and Supervision and a Juris Doctorate Degree, while the male only has a B.S. in Chemistry, a Certificate in Quality Engineering and at that time was enrolled in a graduate program in Industrial Pharmacy.

A review of the job description reflects that on January 3, 1983, the educational requirements were modified in that where Respondent formerly required "...a doctoral degree in a relevant discipline or the equivalent in appropriate education or experience", the new job descriptions excludes mention of a doctoral degree and substitutes instead "...a preference for some post graduate studies in science; or the desirability of a Masters degree in a relevant discipline; or the equivalent in appropriate education and experience."

Under both the old and new requirements it is evident that Charging Party is better qualified than the male.

However, Respondent argues that Charging Party's law degree is of little value to a Director of Quality Control while the male's studies in Industrial Pharmacy is extremely useful to the company as is his credentials as a Certified Quality Engineer.

It is significant to note that Respondent did reimbursed[sic] Charging Party for her law school studies as such studies were related to the area of Regulatory Affairs and the former title was Director of Quality Control and Regulatory Affairs. While Respondent emphasizes the male's certification as a Quality Engineer, the record clearly shows that such certification is not a requirement for the position, in that it is not mentioned in the former job description, and in the latter, although mentioned, it is listed being desirable but not obligatory.

Thus, in comparing the technical qualifications of both candidates with the requirements of both job descriptions, while Charging Party is still better qualified than the male, it is clear that by making the requirements less stungent[sic] and by including the Quality Engineering certification element, Respondent changed the requirements to better allow the male to qualify for the position.

Respondent avers that in the area of job history, it

determined that the male was better qualified because a) while Charging Party received all excellent evaluations, the male also received excellent evaluations and on three occasions received ratings of exceptional and b) in 1981, it's eleven Directors ranked the 19 managers employed and while Charging Party placed 8th the male placed 4th in the ranking.

With respect to a) above, while the male was rated as exceptional on three occasions, the record shows that Respondent continuously groomed the male for more responsibilities. This is evident in that on two of the three occasions when the male received promotions, he was assigned duties and responsibilities formerly assigned to Charging Party. As a result of this Charging Party's areas of responsibility were further limited on each occasion. The record further shows that several months after each such promotion, Charging Party was rated excellent on those very same responsibilities which had been assigned to the male some months before.

With respect to the 1981 ranking by the Directors, Respondent's official acknowledged that the ranking was not a factor in deciding between the parties for the position.

In the area of job history, Respondent asserts that the male demonstrated much greater dedication and involvement with company objectives in that in 1979 and 1982 he voluntarily worked overtime on Saturdays when he felt he was needed, wherein, Charging Party, rarely, if ever worked overtime and frequently asked for time off to accommodate her law school studies.

However, according to information obtained by the Commission, Charging Party also voluntarily worked overtime when necessary and while on occasion she did leave early to accommodate her law school studies, this did not detract from her dedication and involvement with

company objectives.

In reference to the last area of consideration accomplishments, Respondent states that the male exceeded Charging Party in this area, in that each candidate was assigned three special projects on which they were judged. That while Charging Party was judged very good on one project, fair on the second and poor on the third, the male was judged excellent on two projects assigned him and exceptional on the third.

Charging Party's evaluations contain no criticism of either of the three projects assigned to which she was assigned. While Respondent praises the male's work on the projects to which he was assigned, confidential information obtained by the Commission reflects that his work on those projects was not of the quality maintained by Respondent.

With regard to Respondent's treatment of females as a class, the record shows that Respondent sub-divides its Officials and Officials and Managers EEO category into the following sub-categories:

Officials and Managers I - All Directors
Officials and Managers II - All Managers
Officials and Managers III - All Supervisors

The record shows that as of June 30, 1983 Respondent employed in its Officials and Managers I category 11 persons, all of whom are male; 16 persons in its Officials and Managers II category, 12 males and 4 females (one of whom is Charging Party); and in its Officials and Managers III category, 46 persons of whom 29 are male and 17 are female.

The following chart compares Respondent's female utilization rate in each of its officials and Managers sub-categories with the female availability rates in Puerto Rico where Respondent is located from September 30, 1980 through June 30, 1983:

| | 9/30/80 | | 9/30/80 | | 9/30/82 | | 6/30/83 | |
|---|---|---|---|---|---|---|---|---|
| Job Group | Availa-bility | Utili-zation | Availa-bility | Utili-zation | Availa-bility | Utili-zation | Availa-bility | Utili-zation |
| O/M I | 12.0 | 0.0 | 14.2 | 0.0 | 12.9 | 0.0 | 18.3 | 0.0 |
| O/M II | 23.3 | 12.5 | 30.1 | 10.5 | 32.1 | 11.8 | 35.5 | 25.0 |
| O/M III | 32.4 | 36.1 | 35.0 | 38.5 | 30.4 | 39.0 | 34.2 | 37.0 |

The above reflects severe underutilization of females in Respondent's Officials and Managers I and II sub-categories. Respondent is cognizant of this as it makes similar analyses on a quarterly basis. In as early as 1977, before it began using the three tier system for its Officials and Managers category, Respondent noted that it was underutilizing females as Officials and Managers and Respondent indicated at that time that because of the female availability rate, it did not anticipated many problems in recruiting female candidates.

The above statistical data raises a strong inference that sex is a factor in Respondent's selection of persons for Officials and Managers positions. Furthermore, Respondent has failed to rebut such an inference by demonstrating its efforts to promote qualified females into such positions. For example, the record shows that during the above mentioned period Respondent promoted 29 persons (25 males and 4 females) to Officials and managers position. Of those, 2 males were promoted to the Officials and Managers I category; 6 males and 1 female to the Officials and Managers II category; and, 17 males and 3 females to the Officials and Managers III category. At the same time, Respondent considered and rejected for promotion, 1 female (Charging Party) for the Officials and Managers I category; 1 female for the Officials and Managers II category; and,

10 females for the Officials and Managers III category.

These statistics, coupled with the fact that a less qualified male was promoted over the Charging Party, leads this Commission to conclude that there is reasonable cause to believe that Respondent discriminated against Charging Party because of her sex by refusing to promote her and against females as a class because of their sex by refusing to promote or select them for Officials and Managers positions.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the Parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each Party in the near future to begin the Conciliation Process.

On behalf of the Commission:

1-8-85 /s/ *Edward Mercado*
Date Edward Mercado
District Director

Enclosure
"Notice of Conciliation Process"

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
90 CHURCH STREET, ROOM 1501
NEW YORK, NEW YORK 10007

Ms. Nixa Ramos — Charge No. 021-83-3611
Jardines de Arecibio[sic], Calle Q#50
Arecibio[sic], Puerto Rico — Charging Party

Roche Products, Inc.
State Road #670
Manati, Puerto Rico 00701 — Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission the following determination as to the merits of the subject charge.

The Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness and all other jurisdictional requirements have been met.

The Charging Party alleges that the Respondent retaliated against her by refusing to promote her and by giving her a lower evaluation because she was named as a witness in a Title VII suite[sic] filed against the Respondent, in violation of Title VII, Section 704(a). Charging Party also alleges that because she filed the subject charge with the Commission, that Respondent continued to retaliate against her by harassing her, in further violation of Section 704(a).

The Respondent denies the allegations.

It is undisputed that on February 28, 1983, as part of a Title VII suite[sic] filed against Respondent, that Charging Party was identified as a witness for the plaintiff.

Charging Party contends that subsequent to being so identified that Respondent retaliatorily refused to promote her to Quality Assurance Manager and instead selected a less qualified male; and, that on June 16, 1983, Respondent gave her a lower rating than that which she was promised.
In reference to the promotion issue, Respondent asserts that the male, who assumed the Quality Assurance Manager position on March 7, 1983, had been a manager of a Quality Control section for one and a half years and that its decision to select him was based on the fact that he was a proven effective manager and that the Quality Assurance area included Quality Engineering and he had been a Quality Engineer for three years.
The record shows that while both Charging Party and the male had received all excellent evaluations, Charging Party, although hired as a Grade 4, Quality Assurance Supervisor in October 1974, had been promoted only once (to the position of Quality Assurance Group Supervisor Grade 5, in October 1981), while the male although hired in a Grade 1 non-supervisory position two months after Charging Party, was promoted on four occasions. It is significant to note that while Charging Party has occupied a supervisory position throughout her employment with Respondent, the male only became a supervisor in October 1978 at which time he was supervising 4 associates as compared to Charging Party who was supervising 15 associates. The fact that Charging Party has supervised longer than the male and has received all excellent evaluations attests to her proven ability as a supervisor.
In reference to Respondent's statement that the Quality Assurance area include Quality Engineering and that the male had been a Quality Engineer for 3 years, the job description for Quality Assurance Manager, although mentioning Quality Engineering as an area of responsibility,

does not list certification as a Quality Engineer as one of its requirements. The job description does list as requirements a B.S. degree in Biology, Chemistry or Pharmacy and approximately 3-5 years experience in Pharmaceutical Quality Control. Whereas, the male has a B.S. in Chemistry, Charging Party has a B.S. in Pharmacy and a M.S. in Administration.

Respondent also asserts that in deciding on the male for the position it felt that his selection would provide a twofold benefit for the company in that 1) it would provide the managerial expertise to the Quality Assurance area which was necessary to resolve certain supervisory problems involving Charging Party, and 2) it would diversify the male's managerial skills thereby making him a more valuable asset to the company and would serve as a reward to him for his past excellent performance.

Regarding the supervisory problems involving Charging Party, Respondent asserts that Charging Party had certain problems dealing with one of her subordinates and that the situation became so acute that Charging Party lost credibility with her own personell[sic] and this was an indication of inadequate leadership and communication skills on her part.

Charging party states and the record shows that over the years both she and other supervisors encountered several problems with this one particular individual and that many complaints were filed with Respondent as a result of this person's incompetence and lack of professionalism.

Thus, Respondents[sic] isolated example of Charging Party's alleged inadequate management abilities is not persuasive. This holds especially so, since there is no indication of supervisory deficiencies in Charging Party's performance evaluations through the years in question.

Respondent[sic] assertion that the selection of the male

would "diversify" his managerial skills is most interesting. When Charging Party initially filed her charge with the Commission Respondent incorrectly assumed that Charging Party was complaining about the promotion of a female to the Lab Manager position vacated by the male upon his selection for the Quality Assurance Manager position.

In defending its selection of the female for the Lab Manager position, Respondent asserted, amongst other things, that Charging Party was not qualified for the position because she had never worked in the Lab and consequently had no exposure in that area.

Now, in justifying its selection of the male Respondent asserts that the position would "diversify" his managerial skills.

What the record shows, is that except for a 3 month period in 1981 when the male was assigned to the Quality Assurance area in a non-supervisory capacity, the majority of his exposure had been in the Lab.

Therefore, utilizing Respondent's job factors of exposure and knowledge of a department, Charging Party's nine years of experience is clearly distinguishable from the male's three months of exposure to the same department.

The record shows that as of June 30, 1983, Respondent employed in its Officials and Managers I category, 11 persons, of whom all are male, 16 persons in its Officials and Managers II category, of whom 12 are male and 4 are female; and, in its Officials and Managers III category, 46 persons, of whom there are 29 males and 17 females (one of whom is Charging Party). [1]

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[1] Respondent divides its Officials and Managers EEO category into the following sub-categories:

Officials and Managers I - All Directors
Officials and Managers II - All Managers
Officials and Managers III - All Supervisors

The following chart compares Respondent's female utilization rate in each of its Officials and Managers sub-categories with the female availability rates in Puerto Rico where Respondent is located from September 30, 1980 through June 30, 1983:

| | 9/30/80 | | 9/30/80 | | 9/30/82 | | 6/30/83 | |
|---|---|---|---|---|---|---|---|---|
| Job Group | Availa-bility | Utili-zation | Availa-bility | Utili-zation | Availa-bility | Utili-zation | Availa-bility | Utili-zation |
| O/M I | 12.0 | 0.0 | 14.2 | 0.0 | 12.9 | 0.0 | 18.3 | 0.0 |
| O/M II | 23.3 | 12.5 | 30.1 | 10.5 | 32.1 | 11.8 | 35.5 | 25.0 |
| O/M III | 32.4 | 36.1 | 35.0 | 38.5 | 30.4 | 39.0 | 34.2 | 37.0 |

The above statistical data raises a strong inference that sex is a factor in Respondent's selection of persons for Officials and Managers positions and Respondent has failed to rebut such an inference by demonstrating its efforts to promote qualified females into those positions. For instance, during the above-mentioned time period Respondent promoted 29 persons, 13.8% of whom were female, to Officials and Managers positions. Of those, 2 males were promoted to the Officials and Managers I category; 6 males and 1 female [2] to the Officials and Managers II category; and 17 males and 3 females in the officials and Managers III category. At the same time, Respondent considered and rejected for promotion 1 female for the Officials and Managers I category; 1 female (Charging Party) for the Officials and Managers II category; and 10 females for the Officials and Managers III category.

These statistics , coupled with the fact that Charging Party

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[2] This female is the aforementioned person promoted to the Lab Manager position.

was passed over for promotion in favor of an arguably less qualified male, leads this Commission to conclude that there is reasonable cause to belive[sic] that Respondent discriminatorily refused to promote Charging Party because of her sex, and, that Respondent discriminates against females as a class by refusing to promote or select them for Officials and Managers positions because of their sex, in violation of Title VII.

With respect to the issue of Charging Party's June 1983 performance evaluation, it is Charging Party's contention that on June 14th, when discussing her draft evaluation with the new Quality Assurance Manager, he advised her that she would be receiving and excellent rating. When Charging Party received the evaluation two days later it had been changed to a lower rating.

Respondent denies that Charging Party was told that she would be given an excellent rating, and states that it was made quite clear to her that she would not be given an excellent rating.

However, the record shows that since the beginning of her employment with Respondent, Charging Party has held basically the same position, performing the same duties with the same responsibilities. During this time she has received excellent evaluations. On June 16, 1983, four months after being identified as a witness in the suite[sic] filed against Respondent, she was given a lower rating for her performance. Respondent has failed to provide any adequate explanation for this.

It is undisputed that during the pendancy[sic] of this matter before the Commission, in May 1984, Respondent reassigned the Charging Party from the position of Quality Assurance Group Supervisor, Grade 5 to the newly created position of GMP Training Supervisor, Grade 5.

Respondent asserts that Charging Party's former position was one of four positions eliminated during April and May 1984 and that she was assigned to the newly created position based on its need for a more formal and structured training program. Respondent maintains that the scope and influence of the new position exceeds by far that of her former position.

However, in terms of responsibilities, the record clearly shows that Respondent reassigned Charging Party to a position of less responsibility. For example, formerly Charging Party had been responsible for supervising and training 22 associates of whom 5 were exempt; and directing and controlling the operations of Pharmaceutical and Packaging Quality Assurance Supervisors, Auditors, and Quality Control Sampler Inspectors. In her new position, Charging Party supervises two to four subordinates and is basically responsible for the Corporate GMP Training Program.

Charging Party states that since her reassignment, she has been removed from her office and assigned to work in a hallway like corridor and not given any equipment with which to work.

Respondent's official denies that Charting Party has been removed from her office and states that while there has been a theft of equipment, new equipment has been ordered and Charging Party should be able to carry out her functions in the near future.

However, the Commission has obtained evidence to the contrary, in that Charging Party was removed from her office and assigned to work in a hallway-like corridor. Furthermore, as of August 1984, four months after Charging Party's reassignment, she still had not been provided equipment with which to work.

Thus, based on the sequence of events following Respondent's becoming aware of Charging Party's participation in a Title VII suite[sic], and her filing of a charge with the Commission, coupled with a question of Respondent's credibility as to Charging Party's evaluation and her reassignment, the Commission finds that there is reasonable cause to conclude that Respondent has engaged in unlawful harassment of Charging Party, and continues to do so, in violation of Title VII, Section 704(a).

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the Parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the Conciliation Process.

On behalf of the Commission:

1-8-85
Date

/s/ *Edward Mercado*
Edward Mercado
Distirct[sic] Director

# Title 42
# The Public Health and Welfare

## § 2000e-2 Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

## § 2000e - Part IV Sec. 1 - 301(a), (b)

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

# 29 L.P.R.A. § 146

## §146 Discrimination for age, race, color, creed, sex, social or national origin or social position

Any employer who discharges, lays off or discriminates against an employee regarding his salary, wage, pay or remuneration, terms, rank, conditions, or privileges of his work, or who fails or refuses to hire or rehire a person, or who limits or classifies his employees in any manner which tends to deprive a person of employment opportunities, or to affect his status as employee, on the basis of age, as defined hereinafter, race, color, sex, social or national origin or social position, political or religious beliefs of the employee or applicant for employment:

(a) shall incur civil liability

(1) for a sum equal to twice the amount of damages sustained by the employee or applicant for employment on account of such action;

(2) or for a sum of not less than one hundred (100) nor more than one thousand (1,000) dollars, in the discretion of the court, if no pecuniary damages are determined;

(3) or twice the amount of the damages sustained, if such amount is under the sum of one hundred (100) dollars; and

(b) he shall also be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not

less than one hundred (100) dollars nor more than five hundred (500) dollars, or by imprisonment in jail for a term of not less than thirty (30) nor more than ninety (90) days, or by both penalties, in the discretion of the court.

In the judgment passed on civil actions brought under the preceding provisions, the court may direct the employer to reinstate the employee in his former job, and to cease and desist from such action. —— June 30, 1959, No. 100, p. 284, § 1; May 30, 1972, No. 50, p. 114, § 3; June 22, 1975, No. 58, p. 131, § 2; June 7, 1977, No. 37, p. 81, § 2; June 3, 1983, No. 67, p. 142, § 2, eff. June 3, 1983.